IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-64

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Petitioners,

v.

ARTHUR F. QUERN, Director, Illinois Department of Public Aid,

and

JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D.,

Respondents.

CONDITIONAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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If this Court decides that the questions respondents or the United States present in their appeals from the lower court's judgment of April 30, 1979,[1] require

[1] In that judgment, *Zbaraz v. Quern*, [1979] Medicare and Medicaid Guide (CCH) ¶29,644 (N.D. Ill. April 29/30, 1979), at p. 52a, *infra*, the district court, on remand from the court of appeals' decision as to which this writ is sought, held unconstitutional both a federal appropriations provision governing funding of abortions (the "Hyde Amendment") and an Illinois abortion coverage policy incorporating the standards of the Hyde Amendment. Respondents here (defendants in the

(Footnote continued on following page)

plenary consideration within the meaning of Supreme Court Rule 15(f), or if this Court summarily reverses that district court judgment insofar as it held the Illinois abortion funding policy unconstitutional,[2] then petitioners respectfully request a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on February 13, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (p. 1a, *infra*) is reported at 596 F.2d 196 (7th Cir. 1979). That opinion vacated and remanded a judgment of the District Court for the Northern District of Illinois, dated June 13, 1978. The district court's unreported opinion, dated May 15, 1978, is reprinted in the Appendix, p. 19a, *infra*.

[1] *continued*
district court) have appealed that decision directly to this Court, under 28 U.S.C. § 1252 (1976); so also has the United States, which intervened in these proceedings only on remand from the court of appeals' decision, and so is not a respondent here. It is those appeals from that district court judgment to which reference is made in the text.

[2] Final Judgment and Order, ¶¶4(a)(i), 5, at pp. 54a, 55a, *infra*.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976). The opinion of the Court of Appeals for the Seventh Circuit was issued and its judgment was entered (p. 14a, *infra*) on February 13, 1979. The court of appeals denied petitioners' motion to recall the mandate on March 13, 1979 (p. 16a, *infra*). On May 10, 1979, Mr. Justice Stevens extended the time for filing this petition for a writ of certiorari to and including July 13, 1979.[3]

QUESTIONS PRESENTED

1. Whether a provision of the Fiscal Year (FY) 1979 Labor-HEW Appropriations Act, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (the "Hyde Amendment")—which, on its face, limits only the use of federal funds for abortions—substantively amends Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, to allow Il-

[3] In their application for an extension of time in which to file this petition, presented to Mr. Justice Stevens, petitioners stated that their present intention was to file a cross-appeal from the April 30, 1979, district court judgment, and offered as a ground for granting the requested extension that it would enable petitioners to file their jurisdictional statement at the same time that they filed this petition (Application for Extension of Time, p. 3). Subsequently, on May 25, 1979, petitioners here did file a notice of cross-appeal from the April 30, 1979, district court judgment. They have now decided, however, not to pursue this cross-appeal and, simultaneously with the filing of this petition, have filed, under SUP. CT. RULE 14(1), a stipulation that their appeal be dismissed. Accordingly, this petition is not submitted with any jurisdictional statement.

linois to withdraw funding under its Medicaid program for medically necessary abortion services Title XIX would otherwise require it to provide.

2. Whether the court of appeals erred in directing the district court to consider the constitutionality of the Hyde Amendment, when plaintiffs have never challenged, or sought any relief with respect to, that provision and were not bound on remand to do so.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are:

1. The Social Security Act, 42 U.S.C. §§ 1320c(1) (1976); 1320c-1(a), (b)(1), (e) (1976), *as amended by* Pub. L. No. 95-142, § 5(a), (o)(1) (1977); 1320c-4(a)(1)(A), (B) (1976), *as amended by* Pub. L. No. 95-142, § 5(d)(3)(B)(i), (o)(2) (1977); 1320c-5(a), (b) (1976); 1396 (1976); 1396a(a)(10), (13)(A)-(D), (17), (19), (22), (30) (1976); 1396b(a)(1), (5) (1976); 1396d(a) (1976), *as amended by* Pub. L. No. 95-210, § 2(a) (1977);

2. Labor-HEW Appropriations Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) ("The Hyde Amendment");

3. Regulations of the United States Department of Health, Education and Welfare, 44 Fed. Reg. 17937 (1979) (to be codified in 42 C.F.R. § 435.903); 42 C.F.R. §§ 440.210-.230, .260 (1978);

4. Illinois Act of Nov. 17, 1977, P.A. 80-1091, § 1, ILL. REV. STAT. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1977).

As the statutes and regulations are lengthy, they are reproduced in the Appendix, pp. 58a-73a, *infra*.

STATEMENT OF THE CASE

Prior to December 15, 1977, Illinois provided public assistance funding for all abortions—whether medically necessary or elective—for indigent women participating in one of the state's medical assistance programs. The principal such program is the state Medicaid program, established pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, which is designed to enable states willing to comply with certain statutory requirements to provide necessary medical services for categories of needy persons. *See* ILL. REV. STAT. ch. 23, § 5-1 *et seq.* Over one million persons in Illinois are eligible for Medicaid.[4]

Title XIX requires participating states to establish reasonable standards for determining the extent of medical assistance under their programs that are consistent with the objectives of the Medicaid Act, including the objective of furnishing medical assistance to meet

[4] U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, HEALTH CARE FINANCING ADMINISTRATION, MEDICAID STATE TABLES FISCAL YEAR 1976 (1978), Table 2. Illinois has established two parallel state programs providing medical assistance to indigents not qualifying for Medicaid. The state-funded General Assistance program ("GA"), ILL. REV. STAT. ch. 23, § 6-1 *et seq.*, provides medical assistance payments on behalf of persons who qualify for general assistance cash benefits. The Aid to the Medically Indigent program ("AMI"), ILL. REV. STAT. ch. 23, § 7-1 *et seq.*, provides medical assistance payments on behalf of persons whose income or resources are too high to qualify them for GA (even though they would otherwise be eligible) but are nonetheless insufficient to meet the costs of necessary medical care. Compared to the Medicaid program, the GA and AMI programs are small. Approximately 70,000 persons in Illinois receive GA; no more than 20,000 receive AMI. IDPA, ANNUAL REPORT 1976, p. 9.

the costs of necessary medical services, *Zbaraz v. Quern*, 596 F.2d 196, 198 (7th Cir. 1979) (p. 4a, *infra*); 42 U.S.C. §§ 1396a(a)(17), 1396 (pp. 64a, 61a, *infra*), and further prohibits participating states from discriminating in the funding of medical services based on type of condition. *Zbaraz v. Quern, supra*, at 199 (pp. 5a-6a, *infra*); *see* 42 C.F.R. 440.230(c)(1) (p. 70a, *infra*).

While Congress has never altered these obligations by amending Title XIX, it has, for the last three years, attached riders, each commonly referred to as the annual "Hyde Amendment," to the annual HEW appropriations bill. The latest such rider was attached to the FY 1979 Labor-HEW Appropriations Act. It states:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law-enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978.[5]

On November 17, 1977, the Illinois legislature, overriding a gubernatorial veto, amended the state's medical

[5] The FY 1978 appropriations rider, Pub. L. No. 95-205, § 101 (1977), was identical to that for FY 1979. The FY 1977 rider, Pub. L. No. 94-439, § 209 (1976), was worded more restrictively. It provided: "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term." In practice this standard appears to be almost as restrictive as that of the FY 1978 and FY 1979 riders. *See* n.17, *infra*.

assistance program statutes to withdraw funding for all abortions except those necessary to preserve the life of the pregnant woman. P.A. 80-1091, § 1, ILL. REV. STAT. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1977) (p. 71a, *infra*). This enactment was and remains essentially the only limitation on otherwise comprehensive state programs of funding necessary and essential medical care, including hospital, physician and clinic services. *See id.*; IDPA, Illinois Medical Assistance Program Rule 4.01 *et seq.*

Petitioners ("plaintiffs") brought this class action against the Director of the Illinois Department of Public Aid ("IDPA")[6] to enjoin enforcement of the state's restriction, insofar as it prohibited coverage of any medically necessary abortions under the state's medical assistance programs.[7] Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(3) and (4). Plaintiffs alleged that the Illinois statute violated both Title XIX of the Social Security Act and the Fourteenth Amendment to the United States Constitution. The named plaintiffs were a pregnant woman participating in the Illinois Medicaid program, for whom a physician had determined that an abortion was medically necessary, though not necessary to preserve her life; two physicians, each of whose practice includes the per-

[6] IDPA is the state agency charged with administering the state's medical assistance programs. Two physicians were later allowed to intervene as defendants. *See* p. 22a, *infra*.

[7] Plaintiffs defined "medically necessary" to encompass situations where a physician determined that the pregnancy posed an abnormal risk to the woman's health, essentially adopting the definition delineated in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), and reiterated in *Beal v. Doe*, 432 U.S. 438, 441 n.3 (1977): "[w]hether an abortion is 'necessary' is a professional judgment that . . . may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."

formance of abortions for Medicaid-eligible women; and the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits for necessary medical services.[8]

On May 15, 1978, the district court issued a Memorandum Opinion finding that the state's restriction on medically necessary abortions under its Medicaid program violated Title XIX of the Social Security Act.[9] As to the defense that the Hyde Amendment had amended Title XIX, the district court concluded that the provision was a federal funding limitation only and did not operate to modify the state's federal statutory obligation to provide medically necessary services under its Medicaid program. The court issued a permanent injunction requiring Illinois to fund all medically necessary abortions under its medical assistance programs (p. 30a, *infra*). Having decided the statutory question for the plaintiffs, the district court found it unnecessary to reach the constitutional issue. *Id.* On June

[8] The action was brought on behalf of two classes. One consisted of all pregnant women eligible for the Illinois medical assistance programs, for whom an abortion is medically necessary, but not necessary for the preservation of their lives. The other consisted of all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs. The district court certified both classes (p. 26a, *infra*).

[9] The district court had initially decided to abstain from consideration of the case. *Zbaraz v. Quern*, No. 77 C 4522 (Memorandum Opinion and Order, December 21, 1977). Plaintiffs appealed, and the court of appeals entered an injunction pending appeal requiring state coverage of all medically necessary abortions. *Zbaraz v. Quern*, No. 77-2290 (7th Cir. January 11, 1978). Subsequently, the court of appeals reversed the district court's abstention decision. *Zbaraz v. Quern*, 572 F.2d 582 (7th Cir. 1978).

13, 1978, a final judgment and order was entered on the May 15 decision.

On defendants' appeal from the district court judgment, the United States Court of Appeals for the Seventh Circuit agreed that Illinois P.A. 80-1091 was inconsistent with the requirements of Title XIX standing alone, but held that the Hyde Amendment operated substantively to amend Title XIX to permit Illinois to deny state support for all abortions other than those for which the Hyde Amendment provided federal funding. The court of appeals directed the district court to modify its injunction to require Illinois to fund only those abortions covered by the Hyde Amendment. The court of appeals also directed the district court to determine "the constitutional questions that remain open," including specifically the constitutionality of the Hyde Amendment (p. 11a, *infra*).

On remand the district court thus notified the United States, pursuant to 28 U.S.C. § 2403(a) (1976), that the constitutionality of a federal statute had been drawn into question. On March 8, 1979, the United States was granted permission to intervene under 28 U.S.C. § 2403(a). After further proceedings in which the United States took part, the district court granted partial summary judgment to plaintiffs and defendants. Final Judgment and Order, April 30, 1979 (p. 52a, *infra*). The court held that (1) Illinois P.A. 80-1091, as modified under the court of appeals' decision to embody the standards of the Hyde Amendment, violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, as applied to deny funding for abortions performed prior to fetal viability (p. 54a, *infra*); (2) the Hyde Amendment, to the extent it permitted Illinois to deny funding for any medically necessary abortions

performed prior to fetal viability, violated the Fifth Amendment to the United States Constitution (pp. 54a-55a, *infra*);[10] and (3) both the Hyde Amendment and Illinois P.A. 80-1091, as modified to embody the standards of the Hyde Amendment, were constitutional as applied to deny funding for medically necessary abortions, other than life-preserving ones, performed after fetal viability (p. 55a, *infra*). The district court enjoined Illinois from refusing to fund, under its medical assistance programs, any medically necessary abortions performed prior to fetal viability (p. 56a, *infra*).[11]

Respondents and the United States filed timely notices of appeal to this Court from the district court's judgment.

[10] The district court expressed doubt about the propriety of ruling on the Hyde Amendment but stated that it felt constrained to do so by the terms of the court of appeals' remand. Memorandum Opinion and Order, April 29, 1979 (p. 37a, n.3, *infra*).

[11] The court enjoined only the "restrictive Illinois abortion funding policy" as defined in the judgment (p. 56a, *infra*). The Hyde Amendment was the subject only of declaratory relief (pp. 55a-56a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

REVIEW OF THE COURT OF APPEALS' DECISION WILL PERMIT DISPOSITION OF THIS CASE WITHOUT THIS COURT'S RESOLUTION OF CONSTITUTIONAL QUESTIONS PRESENTED BY THE APPEALS FROM THE SUBSEQUENT DISTRICT COURT DECISION.

"A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question." *Califano v. Yamanski*, 47 U.S.L.W. 4765, 4767 (June 20, 1979) (citations omitted). Respondents and the United States have appealed to this Court from the district court's April 30, 1979, judgment entered after remand from the court of appeals. Those appeals present for review two constitutional questions: (1) whether "Illinois' restrictive abortion funding policy,"[12] as applied to deny coverage, under the Illinois medical assistance programs, for medically necessary abortions performed prior to fetal viability, violates the Fourteenth Amendment to the United States Constitution, and (2) whether the Hyde Amendment, as construed to permit Illinois to deny such funding under its Medicaid program, violates the Fifth Amendment to the United States Constitution. Granting the present petition may allow this Court to avoid deciding either of those constitutional questions.

The first question urged as a basis for the present petition is whether the Hyde Amendment substantively amends Title XIX of the Social Security Act to allow Il-

[12] *See Zbaraz v. Quern*, Final Judgment and Order, ¶2(e) (defining that term as used in the judgment) (p. 53a, *infra*).

linois to deny, under its Medicaid program, medically necessary abortion services Title XIX would otherwise require it to provide. Granting certiorari as to this question and resolving it favorably to petitioners will give them the full relief they seek—state coverage of all medically necessary abortions under the Illinois medical assistance programs, thus obviating any need to decide either constitutional question.[13] *See Van Lare v. Hurley*, 421 U.S. 338, 344 (1975).

[13] The court of appeals ruled that, in the absence of the Hyde Amendment, Title XIX of the Social Security Act would require Illinois to fund all medically necessary abortions. Respondents Williams and Diamond now seek this Court's review of that decision in their appeal from the district court's subsequent April 30, 1979, judgment. The decisions of this Court, however, preclude them from securing review of the court of appeals' decision in this collateral fashion. *E.g.*, *Farmers and Mechanics Nat'l Bank v. Wilkinson*, 266 U.S. 503, 506 (1925); *Union Trust Co. v. Westhus*, 228 U.S. 519, 522-24 (1913). Their time for properly seeking review of the court of appeals decision has, of course, expired. 28 U.S.C. § 2101 (1976). Nor can respondents urge the point as an alternative ground of affirmance of the court of appeals' judgment because, having failed in a timely fashion to seek review of the court of appeals' decision, they cannot urge as a basis for affirmance a rationale that, by relieving Illinois from an obligation even to fund Hyde Amendment abortions, would give them more relief than did the court of appeals' decision itself. *See* n.14, *infra*.

The court of appeals also ruled that the provisions of Illinois P.A. 80-1091 applicable to the GA and AMI programs (neither is governed by Title XIX) were not severable from that governing the Medicaid program, and that if the latter fell the former must, as a matter of state law, also fall. For the same reasons that respondents Williams and Diamond cannot secure review of the court of appeals' decision on the Title XIX question, no respondent can secure review of its decision on the severability question.

The only relevant statutory question properly before this Court is thus the Hyde Amendment question urged as a basis for this petition. Its resolution favorably to plaintiffs, taken with the court of appeals' previous resolution of the Title XIX and severability questions, will be sufficient to grant petitioners the full relief they seek.

The second question presented in this petition is whether the court of appeals erred in directing the district court to consider on remand the constitutionality of the Hyde Amendment. Granting certiorari as to this question and resolving it favorably to petitioners will make unnecessary this Court's resolution of any question related to the Hyde Amendment's constitutionality, regardless of what other questions in the case are addressed, or how they are resolved. For if, as plaintiffs argue, *see* p. 25, *infra*, the district court lacked threshold subject matter jurisdiction to consider the constitutionality of the Hyde Amendment, then this Court would necessarily vacate that part of the district court's judgment relating to the Hyde Amendment, without reaching the question of its constitutionality. *See United States v. American Friends Service Committee*, 419 U.S. 7, 12n.7 (1974).

In sum, the reasons for avoiding unnecessary constitutional adjudication, *see Ashwander v. TVA*, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J. concurring in part), argue strongly for granting the writ as to both questions presented.[14] *See also Taylor v. Lavine*, 419 U.S. 1048

[14] Several decisions of this Court hold that when the rationale of an argument would not dictate affirmance of the lower court's judgment, but would give the party seeking affirmance more than that judgment, the argument cannot be raised as an alternative ground for affirmance, but must be raised by cross-appeal or cross-petition. *E.g.*, *NLRB v. Int'l Van Lines*, 409 U.S. 48, 52n.4 (1972); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381n.4 (1970). It is this restriction that will preclude respondents from raising the statutory questions resolved adversely to them in the court of appeals, as alternative grounds for affirmance, should this Court grant this petition. *See* n.13, *supra*. In *NLRB* and *Mills*, *supra*, the parties seeking affirmance of the lower court judgment had the opportunity to raise by way of cross-petition or cross-appeal the arguments that this Court held it would not entertain, but

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(1974) (granting certiorari to review court of appeals judgment as to Social Security Act statutory question); *Van Lare v. Hurley*, 419 U.S. 1045 (1974) (noting probable jurisdiction of direct appeal from three-judge district court presenting constitutional questions coextensive with that statutory question); *cf. Van Lare v. Hurley*, 421 U.S. 338 (1975) (disposing of case by resolution of the statutory question).

II.

THE COURT OF APPEALS DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING THE AVAILABILITY OF PUBLIC FUNDING FOR MEDICALLY NECESSARY ABORTIONS IN MANY STATES WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

Whether Medicaid funding will be available for medically necessary abortion services in a large majority of states may, without raising constitutional questions, be determined by the statutory Hyde Amendment question the court of appeals' decision presents. At least thirty-six states, in addition to Illinois, have

[14] *continued*
they chose to forego that opportunity. In this case, on the other hand, petitioners seeking review of the court of appeals' judgment cannot bring their Hyde Amendment statutory claim before this Court by cross-appealing from the district court judgment. *Farmers and Mechanics Nat'l Bank v. Wilkinson*, 266 U.S. 503, 506 (1925); *Union Trust Co. v. Westhus*, 228 U.S. 519, 522-24 (1913). Accordingly, the *Mills* line of cases would not seem to preclude petitioners from raising their statutory Hyde Amendment claim as an alternative ground for affirming the April 30th district court judgment. If, however, these cases were thought to foreclose petitioners from raising that claim in the appeal proceeding, then granting this petition for certiorari would presumably be the *only* way that this Court could entertain the statutory Hyde Amendment claim, and thus avoid reaching the constitutional questions.

already adopted standards of Medicaid funding for medically necessary abortions far more restrictive than any this Court has ever held permissible. Fifteen states have limited their Medicaid abortion services to only those instances where it can be shown that continuation of the pregnancy would endanger the woman's life or that an abortion is necessary to prevent the woman's death.[15] Twenty-two others have adopted marginally less restrictive statutes or regulations patterned on the Hyde Amendment language.[16]

[15] ILL. REV. STAT. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1977); KY. REV. STAT. ANN. § 205.010; LA. REV. STAT. ANN. § 40:1299.35; 1978 Mass. Acts ch. 367, § 2, Item 4402-5000; MO. REV. STAT. § 208.153; N.J. STAT. ANN. § 30:4D-6.1; 1978 Pa. Laws 1978-16A, 1978-149; S.D. COMP. LAWS ANN. § 28-6; UTAH CODE ANN. § 55-5-3; Wyo. Appropriations Act, § 25, Item 6 (March 17, 1978); Conn. Dep't of Social Services, Health Bull. No. 58 (Aug. 19, 1977); Fla. Admin. Rules ch. 10C-7.38, 10C-7.39 (rev. Sept. 1, 1977); Neb. Div. of Medical Assistance, Opinion of Director, Sept. 6, 1977; N.D. Medical Services Bd., Memorandum of Director, Oct. 20, 1977; R.I. Dep't of Social and Rehabilitative Services, Memorandum of Director, Sept. 28, 1977.

[16] Cal. 1978 Appropriations Act, ch. 359 (July 6, 1978); Tenn. FY 1978-1979 Appropriations Act, § 57 (May 11, 1978); 1977 Wis. Laws, ch. 245 (April 11, 1978); Ala. Comm'r of Medical Assistance, Memorandum of Feb. 22, 1978; Ark. Dep't of Human Services, Memorandum of Director of Medical Services, No. MSP-78-A&B-08 (Feb. 16, 1978); Del. Div. of Social Services, rev. regs., May, 1978; Ga. Dep't of Medical Assistance, Memorandum of Comm'r, Feb. 14, 1978; Ind. Dep't of Pub. Welfare, Memorandum of March 17, 1978; Me. Dep't of Human Services, Div. of Medical Assistance, Memorandum of Director, Aug. 9, 1977; Miss. Medicaid Comm'n, Memorandum of Director, Aug. 8, 1977; Mont. Social and Rehabilitative Services, Economic Assistance Div., Memorandum of Director of Medical Assistance Bureau, Jan. 5, 1978; Nev. State Assistance for the Medically Indigent, Bull. No. 97 (July 19, 1978); N.H. Dep't of Health and Welfare, Memorandum of Director of Div. of Welfare, May 8, 1978; Ohio Dep't of Pub. Welfare, Memorandum of Director, Jan. 5, 1978; Okla. Dep't of Pub. Welfare, Letter of Director,

(Footnote continued on following page)

Because indigent women are obviously without the discretionary funds to pay for abortions, and because only a very small fraction of medically necessary abortions meet the Hyde Amendment standards, the undisputed result of these various restrictions on Medicaid funding for abortions is the denial of medically necessary abortions to the overwhelming majority of indigent women for whom the procedure is medically necessary. *Williams v. Zbaraz*, 47 U.S.L.W. 3772, 3773 (May 24, 1979) (Stevens, J. in chambers); *Zbaraz v. Quern* (N.D. Ill. April 29, 1979), p. 49a, *infra*.[17] The dis-

[16] *continued*
June 2, 1978; S.C. Dep't of Social Services, Circular Letter No. 2320-A (Feb. 24, 1978); Tex. Medical Assistance Program, Bull. No. 6 (Jan. 1978); Vt. Dep't of Social Welfare, Memorandum of Director of Medical Services, April 13, 1978. Four states restrict funding to life-endangerment, rape and incest situations only, and do not provide funding for situations involving severe and long-lasting physical health damage: Iowa Social Services and Appropriations Act, § 16, Item 4 (June 22, 1978); 1978 Minn. Laws ch. 508; Kan. Dep't of Social Services, Secretary's Memorandum L-230 (Sept. 20, 1978); N. Mex. State Welfare Agency, Div. of Social Services, Memorandum of Director, Oct. 1, 1977.

[17] The record in this case shows that fewer than 3% of all medically necessary abortions performed in Illinois during 1978 fit the Hyde Amendment standards. Compare IDPA, Utilization of Individual Abortion Procedures, 1978 (Exh. F), with HEW data on federal reimbursement for abortions, February, 1978, through September, 1978 (Exh. H), submitted with plaintiffs' memorandum, March 22, 1979. HEW data on abortions being funded under state Medicaid programs shows that there is little, if any, difference in the number of Medicaid abortions between states employing the FY 1979 Hyde Amendment standard and states limiting funding to "life-preserving" or "death-preventing" abortions. HEW data (Exh. H) and Affidavit of Barbara Lindheim (Exh. G), submitted with plaintiffs' memorandum, March 22, 1979. Regardless of which restrictive standard has been adopted, the number of Medicaid abortions for indigent women, including medically necessary abortions, is less than 5% of the number prior to adoption of the restrictions.

trict court found on the basis of the undisputed evidence that "the effect of the new [Illinois abortion funding policy] . . . will be to increase substantially maternal morbidity and mortality among indigent pregnant women" (p. 47a, *infra*), and that implementation of the restrictive policy would subject the indigent women denied the medically necessary abortions they need to "considerable risk of severe medical problems, which may even result in [their] death[s] (p. 47a, *infra*).[18]

The health risks to indigent pregnant women principally posed here are those accompanying their inability to secure the medically necessary abortions they need, at least through safe and legal means. But even if some of these women are assumed to be able to "'beg, borrow or steal'" the funds for legal abortions, *Williams v. Zbaraz*, 47 U.S.L.W. 3772, 3773 (May 24, 1979) (Stevens, J. in chambers), the delay occasioned in obtaining the money to pay for the abortion would itself be harmful. "Time, of course, is critical in abortion. Risks during the first trimester are admittedly lower than during the later

[18] The record in the district court is replete with examples of the medical problems presented by limiting medically necessary abortions to the Hyde Amendment standards. *See, e.g.*, Affidavit of Dr. Oren R. Depp (Exh. C-10 to C-12), submitted with plaintiffs' memorandum, March 22, 1979 (citing example of women with essential hypertension, which presents a significant risk of eclamptic seizures, hemorrhage, aspiration pneumonia); *see also* Affidavit of Dr. David Zbaraz (Exh. E), referred to in Memorandum Opinion of April 29, 1979 (pp. 47a, 49a, n.12, *infra*) (citing example of women with sickle cell disease who have a 25% risk of going into sickle cell crisis and dying as a result of pregnancy); Affidavit of Dr. Peter Barglow (Exh. D) (p. 48a, n.11, *infra*) (citing example of some women forced to carry pregnancy to term becoming severely depressed or psychotic and engaging in such self-destructive behavior as self-starvation). *See, generally*, Depp Affidavit (Exh. C), submitted with plaintiffs' memorandum, March 22, 1979.

months." *Doe v. Bolton*, 410 U.S. 179, 198 (1973); *see also Bellotti v. Baird*, 47 U.S.L.W. 4969, 4974 (July 2, 1979).

The validity of the state restrictions that pose these and other medical problems for indigent pregnant women may turn on the statutory Hyde Amendment question, for review of which this writ is sought.[19] Given the number of states that have adopted such restrictions, and the seriously adverse impact of the restrictions on the health of indigent women for whom abortions are medically necessary, this question is one of substantial importance and should be resolved by this Court.

[19] The question of whether Title XIX of the Social Security Act would, in the absence of the Hyde Amendment, require coverage of medically necessary abortion services under state Medicaid programs is not one properly presented to this Court. *See* n. 13, *supra*. But every court that has addressed this question, save one, has concluded that exclusion of such services would violate the Act. *Preterm v. Dukakis*, 591 F.2d 121 (1st Cir. 1979); *Doe v. Busbee*, No. C79-786A (N.D. Ga. June 4, 1979) (preliminary injunction); *Emma G. v. Edwards*, No. 77-1342 (E.D. La. Nov. 27, 1978) (preliminary injunction); *Freiman v. Walsh*, No. 77-4171-CV-C (W.D. Mo. Jan. 26, 1979); *Roe v. Casey*, No. 78-2214 (E.D. Pa. Dec. 21, 1978); *Smith v. Ginsberg*, No. 75-0380 CH (S.D. W.Va. May 9, 1978); *Right to Choose v. Byrne*, No. C-3817-17 (Super. Ct. N.J. July 2, 1979); *see Rush v. Parham*, 440 F.Supp. 383, 390n.13 (N.D. Ga. 1977) (dictum); *Emma G. v. Edwards*, 434 F.Supp. 1048, 1050 (E.D. La. 1977) (dictum); *see also White v. Beal*, 413 F.Supp. 1141, 1152-53 (E.D. Pa. 1976), *aff'd*, 555 F.2d 1146 (3d Cir. 1977). The one case to the contrary, *D ..... R ..... v. Mitchell*, 456 F.Supp. 609 (D. Utah 1978), *appeal pending*, No. 78-1675 (10th Cir. 1979), is the only federal case holding that Title XIX permits the denial of medically necessary services on the basis of diagnosis or conditions.

As to the split among the courts addressing the issue presented here, *see* n.24, *infra*.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS:

A. ITS DECISION THAT THE HYDE AMENDMENT SUBSTANTIVELY AMENDED THE SOCIAL SECURITY ACT SO AS TO PERMIT ILLINOIS TO DENY FUNDING FOR MEDICALLY NECESSARY ABORTIONS CONFLICTS WITH THIS COURT'S DECISION IN *TVA v. HILL* AND EARLIER DECISIONS.

In *TVA v. Hill*, 437 U.S. 153 (1978), this Court held that an appropriations provision for completion of a public works project threatening the habitat of an endangered species did not amend a substantive statute protecting that habitat. Chief Justice Burger, writing for the Court, reaffirmed and applied three principles of statutory construction. The first is that "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Id.* at 187n.33 (1978), *quoting Crooks v. Harrleson*, 282 U.S. 55, 60 (1930); *see also United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940). The second is a "cardinal rule" that an "intention of the legislature to repeal [a statutory provision] must be clear and manifest," *TVA*, *supra*, 437 U.S. at 189, *quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); "repeals by implication are not favored." *TVA*, *supra*, 437 U.S. at 189, *quoting Morton v. Mancari*, 417 U.S. 535, 539 (1974). And the third is that this "cardinal rule" "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *TVA*, *supra*, 437 U.S. at 190. In holding that the Hyde Amendment amended Title XIX of the Social Security Act, the court of appeals disregarded each of these rules of statutory construction, without requisite justification.

The FY 1979 Hyde Amendment, part of the Labor-HEW Appropriations Act, refers only to the use of federal "funds provided for in [that appropriations] Act," not to the types of services Title XIX requires states to provide as a condition of participation in the Medicaid program. Nothing on the face of the statute suggests that Congress meant to do anything other than limit federal reimbursement for medical services Title XIX requires states to cover as a condition of their eligibility for federal support generally for their Medicaid programs.

The court of appeals recognized the force of both the plain language of the Hyde Amendment and the rule disfavoring repeals by implication, especially through an appropriations measure (p. 10a, *infra*). It was nonetheless convinced that the Hyde Amendment was intended to alter Title XIX by what it referred to as the "overwhelming weight of the legislative history" (p. 10a, *infra*). It is, however, as a threshold matter, questionable whether resort to the legislative history of the Hyde Amendment was appropriate. As this Court stated in *TVA v. Hill*, 437 U.S. 153, 184n.29 (1978):

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Ex parte Collett*, 337 U.S. 55, 61 (1949), and cases cited therein. Here it is not *necessary* to look beyond the words of the statute. We have undertaken such an analysis only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case, *post*, at 196, is not in accord with congressional intent.

See also Preterm v. Dukakis, 591 F.2d 121, 134 (1st Cir. 1979) (Bownes, J. dissenting).[20] Here there is not even arguably an "absurd" result from giving the statute its plain meaning.[21] On the contrary, as the court of appeals itself recognized (p. 8a, *infra*), Title XIX and related statutes not uncommonly require state expenditures for services or eligibility groups unmatched by federal funds.

If resort to legislative history is appropriate, however, the history here hardly constitutes the "clear and manifest" evidence of Congress' "intention to repeal," *TVA v. Hill*, 437 U.S. 153, 189 (1978), required to overcome the unambiguous language of the statute. The legislative history of the Hyde Amendment does not clearly indicate Congress' intent one way or the other. No committee or conference reports accompanied its

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[20] In *Preterm v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), the Court of Appeals for the First Circuit also concluded, on the basis of its reading of the legislative history, that the Hyde Amendment had amended Title XIX to permit state restrictions on coverage of medically necessary abortions. In dissent, Judge Bownes stated (at 135-136):

> The majority opinion cites *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543-44 (1939), in support of the doctrine that, when the plain meaning of a statute produces a result "plainly at variance with the policy of the legislation as a whole," it is necessary to delve into the legislative history. But there is no "legislation as a whole" to consider here. We have an amendment attached to a general appropriations bill. This, of course, is a primary example of why the courts should be and are extremely reluctant to allow a rider to an appropriations bill to amend an entirely separate and distinct statute by implication. *See* extended discussion in *TVA v. Hill* . . .

[21] In *TVA*, *supra*, 437 U.S. at 190, this Court stated that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable," *quoting Morton v. Mancari*, 417 U.S. 535, 549 (1974).

passage. The legislative history consists entirely of floor debates. Attorney General Bell has characterized those floor debates generally as "contradictory and inconclusive in many respects." 43 Fed. Reg. 4835 (February 3, 1978). The court of appeals itself (p. 7a, *infra*) recognized that some Representatives and Senators were of the opinion "that the amendment would simply restrict federal funds for abortions."[22] It is true that neither these legislators nor other supporters or opponents of the Hyde Amendment "ever suggested that [notwithstanding the withdrawal of federal funding] state funding would be required" (p. 7a, *infra*). But it is also true that no legislator ever suggested that the Hyde Amendment was meant substantively to amend Title XIX to permit the states to deny funding for the very *medically necessary* services it was the fundamental purpose of the Act to provide. 42 U.S.C. § 1396 (p. 61a, *infra*).[23] As Judge Bownes stated in dissent in *Preterm v. Dukakis*, 591 F.2d 121, 136 (1st Cir. 1979):

[22] *See, e.g.*, 123 Cong. Rec. H6086, H6090 (daily ed. June 17, 1977) (remarks of Reps. Dornan, Edwards, Volkmer); *see also* 123 Cong. Rec. S19,438-39 (daily ed. Dec. 7, 1977) (remarks of Sen. Dole); 123 Cong. Rec. S18,588-89 (daily ed. Nov. 3, 1977) (remarks of Sen. Helms); 123 Cong. Rec. H10,835 (daily ed. Oct. 12, 1977) (remarks of Rep. Early); 123 Cong. Rec. H10,-966 (daily ed. Oct. 13, 1977) (remarks of Rep. Flood).

[23] The court of appeals sought to distinguish *TVA v. Hill* by noting (p. 9a, *infra*) that "unlike the *Hill* case, there is no question here that Congress as a body was well aware of the implications of the Hyde Amendment and agreed to them." Since the question before the court of appeals was precisely what the implications of the Hyde Amendment were, this point simply begs the question. The court of appeals also found it significant that "the [Hyde] Amendment was in the form of limiting previously authorized expenditures rather than authorizing arguably prohibited expenditures" (p. 10a, *infra*). But the cases the court of appeals relied upon in support of the proposition that "the courts have been less hostile

(Footnote continued on following page)

> My brethren state that "the record is clear that both houses of Congress were acutely conscious that they were engaging in substantive legislation." If this is so, it is hard to understand the absence of any statement during the course of the lengthy debate that the Hyde Amendment was making a significant change in the Medicaid Act. Surely, someone in the Congress would have been perceptive enough and forthright enough to realize the full implications of the amendment and say so. . . . [W]e cannot construe silence on a subject as a positive expression of congressional intent.

In construing a statute, of course, its interpretation by the agency charged with its enforcement is entitled to substantial deference, *Udall v. Tallman*, 380 U.S. 1, 16 (1961), especially when the relevant agency interpretation has been consistent, and rendered close to the date of enactment of the statute in question. *E.I. DuPont de Nemours Co. v. Collins*, 432 U.S. 46, 55 (1977). The court of appeals' interpretation of the Hyde Amendment does not find any support in the opinion of the Department of Health, Education and Welfare. Indeed, the Department's position on this statutory question appears to support petitioners.

In *McRae v. Mathews*, 421 F.Supp. 533 (E.D. N.Y. 1976), HEW stated its understanding that the FY 1977 Hyde Amendment was *not* intended to define the state's

[23] *continued*
to [such] modifications via appropriations bills" (p. 10a, *infra*) were not decided on that rationale and in any event are inapposite here. *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), concerned an express congressional repeal via an appropriations measure. *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977), and *Eisenberg v. Corning*, 179 F.2d 275 (D.C. Cir. 1949), presented situations in which the provision alleged to effect a repeal and prior legislation were irreconcilably in conflict. There is no such conflict here. *See* pp. 20-21, *supra*.

duty to cover abortions under its Medicaid program: ". . . it is clear that, under the Medicaid program, the state's duty to fund medical procedures covered by their plans is wholly independent of their right to subsequent federal reimbursement." Memorandum for the Secretary of Health, Education and Welfare in Opposition to the Application for a Stay Pending Appeal, p. 6 (filed in this Court November, 1977).

The FY 1978 Hyde Amendment (Pub. L. No. 95-205, § 101 (1977)) instructed HEW to issue regulations insuring that the provision be "rigorously enforced." The regulations issued pursuant to that mandate, by their express terms, address only the issue of "Federal financial participation in expenditures for abortions funded through various HEW programs." 43 Fed. Reg. 4570 (Feb. 2, 1978). The HEW comments to supplemental Hyde Amendment regulations state specifically that:

> These regulations only govern the instances where Federal funding is available for abortions and other medical procedures. *They do not deal with the separate question of circumstances under which a State must fund abortions under the Medicaid program.* 43 Fed. Reg. 31875 (July 21, 1978) (emphasis added).

In sum, HEW has consistently interpreted the Hyde Amendment to leave unaffected the states' obligations under their Medicaid programs as defined by Title XIX.[24]

[24] The only other court of appeals to have considered this statutory question reached the same conclusion, by a 2-1 vote, as did the court of appeals in this case. *Preterm v. Dukakis*, 591 F.2d 121 (1st Cir. 1979). But most lower federal courts to have considered the question support HEW's—and petitioners'—understanding of the Hyde Amendment. *Doe v.*

(Footnote continued on following page)

B. THE COURT OF APPEALS' DIRECTION TO THE DISTRICT COURT TO CONSIDER ON REMAND THE CONSTITUTIONALITY OF THE HYDE AMENDMENT INJECTED INTO THE LITIGATION A QUESTION AS TO WHICH THERE WAS NO CASE OR CONTROVERSY.

Petitioners have never challenged the constitutionality of the Hyde Amendment in this litigation or sought relief against any federal official. Declaratory and injunctive relief against the restrictive Illinois abortion funding policy was sufficient to grant them all the relief they sought: state coverage of all medically necessary abortions under the state's medical assistance programs. Federal matching funds for such abortions would secure for plaintiffs no more expansive coverage of abortions than would be theirs under an order finding the restrictive state policy violative of the Social Security Act or the Fourteenth Amendment, and directing state funded coverage. *See* cases collected at n.24, *supra*; *Lewis v. Shulimson*, 405 F. Supp. 807 (E.D. Mo. 1975), *aff'd*, 534 F.2d 794 (8th Cir. 1976). Accordingly, the question of the Hyde Amendment's constitutionality was never raised either in the district court or the court of appeals. It was against this background that the court of appeals

[24] *continued*
Busbee, No. C79-786A (N.D. Ga. June 4, 1979); *Smith v. Ginsberg*, No. 75-0380 CH (S.D. W.Va. May 9, 1978); *Roe v. Casey*, No. 78-2214 (E.D. Pa. Dec. 21, 1978); *Doe v. Mathews*, 422 F.Supp. 141, 143, 146 (D. D.C. 1976) (FY 1977 Hyde Amendment); *Doe v. Mathews*, 420 F.Supp. 865, 869 (D. N.J. 1976) (FY 1977 Hyde Amendment). Moreover, in *Beal v. Doe*, 432 U.S. 438 (1977), this Court analyzed the Pennsylvania abortion funding restriction in terms of the requirements Title XIX imposed on the states, not in terms of the FY 1977 Hyde Amendment, which would have mooted the Title XIX claim in *Beal* had it repealed by implication the substantive requirements of Title XIX.

nonetheless directed the district court to consider on remand the constitutionality of the Hyde Amendment.

The court of appeals' decision in this respect was plainly erroneous. Requiring the district court to consider the constitutionality of the Hyde Amendment presumed that there was a "case or controversy" and thus subject matter jurisdiction over that question. *Powell v. McCormack*, 395 U.S. 486, 495-497 (1969). But the existence of such a case or controversy here depends completely on the claims of the plaintiff classes. *Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975); *see also Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8 (1978). Here, where petitioners never made any claims with respect to the Hyde Amendment, and were not bound on remand to do so, the Article III case or controversy predicate for the district court's resolution of that question was absent. *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974).

CONCLUSION

For the reasons stated above, if this Court decides that the questions respondents or the United States present in their appeals from *Zbaraz v. Quern*, [1979] Medicare and Medicaid Guide (CCH) ¶29,644 (N.D. Ill. April 30, 1979), require plenary consideration within the meaning of Supreme Court Rule 15(f), or if this Court summarily reverses that district court judgment insofar as it held the Illinois abortion funding policy unconstitutional, then the requested writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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July 13, 1979

OPINIONS AND JUDGMENTS BELOW

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-1669, 78-1709, 78-1787,
78-1890, 78-1891, 78-2029

DAVID ZBARAZ, et al.,

Plaintiffs-Appellees,

v.

ARTHUR F. QUERN,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77 C 4522—**Alfred Y. Kirkland**, *Judge.*

ARGUED NOVEMBER 1, 1978—DECIDED FEBRUARY 13, 1979

Before CUMMINGS, SPRECHER, and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This class action was brought under the Civil Rights Act (42 U.S.C. § 1983) to enjoin enforcement of a 1977 Illinois statute withdrawing medical assistance funding in Illinois for all abortions except those "necessary for the preservation of the life of the [pregnant] woman."[1] Plaintiffs do not object to the refusal to fund purely elective abortions, and challenge the limitation on funding only as to medically necessary abortions. They assert that the Illinois statute

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[1] Ill. Rev. Stat. Supp. (1977) ch. 23 §§ 5-5, 6-1, 7-1.

denies them and the classes they represent[2] rights guaranteed by Title XIX of the Social Security Act (Medicaid) (42 U.S.C. § 1396 *et seq.*) and by the Fourteenth Amendment to the United States Constitution.

Plaintiffs are two doctors whose practice includes the performance for indigent women of medically necessary abortions, most of which are not necessary for the preservation of their lives; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman requiring a medically necessary abortion but one that is not necessary to save her life. The principal defendant is Arthur F. Quern, Director of the Illinois Department of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the statute in question. Two other doctors were allowed to intervene as defendants in the court below.

In December 1977 the district court issued an order abstaining from consideration of the case. Plaintiffs appealed and this Court granted them an injunction pending appeal against enforcement of the Illinois statute insofar as it prohibits state funding for therapeutic abortions.[3]

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[2] The classes certified by the district court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs. Because of the injunction granted below, the state resumed its prior medical assistance funding for medically necessary abortions.

[3] Our injunction order defined "therapeutic" as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." The district court employed this definition in its final judgment now here on appeal.

In March 1978 we reversed the district court's abstention order but did not resolve the merits of plaintiffs' motion for a preliminary injunction. *Zbaraz v. Quern*, 572 F.2d 582. Thereafter, the district court held that Title XIX of the Social Security Act and the regulations thereunder require Illinois to provide medical assistance funding for all therapeutic abortions. Judge Kirkland concluded that the Hyde Amendment on which defendants rely does not call for a contrary result.[4] Because the district court resolved the case on statutory grounds, plaintiffs' constitutional challenges were not resolved. The district court permanently enjoined defendants from denying payments under the Illinois medical assistance programs to the plaintiff physicians "and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for therapeutic abortions * * *." This injunction is still in effect.

This opinion starts with a caveat. This panel is interpreting Congressional and Illinois General Assembly laws as they are written. Our line of duty is to construe those laws, neither to condone nor criticize them. Moreover, we do not start with a clean slate, for six years ago the Supreme Court under the Due Process clause of the Fourteenth Amendment invalidated penal laws that restrict legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother." *Roe v. Wade*, 410 U.S. 113, 164. Very recently the Supreme Court reaffirmed that the right to secure an abortion in the early stages of pregnancy is a fundamental right. It also stressed that the abortion decision is primarily a medical one and emphasized the central role of the physician in helping to reach that decision. *Colautti v. Franklin*, ... U.S. ....., 47 LW 4094. With those admonitions in mind, our task is readily charted.

The Court of Appeals for the First Circuit has recently ruled on a challenge to the Massachusetts abortion funding law that is nearly identical to the challenge mounted here to the similar Illinois law.

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[4] The Hyde Amendment (quoted *infra*) was first enacted as a rider to the FY 1977 Health, Education and Welfare appropriations bill. (Section 209 of Pub. L. 95-205; 91 Stat. 1460 Dec. 9, 1977).

Preterm, Inc. v. Dukakis, ... F.2d ..... (1st Circuit, Nos. 78-1324, 78-1325, and 78-1326, decided January 15, 1979). We agree with Judge Coffin's majority opinion in that case.[5]

The First Circuit held in *Preterm* that Title XIX of the Social Security Act does not require funding of all medical care which is deemed "necessary" by the treating physician, but that it does prohibit a state from singling out medically necessary abortions as a category of care which would be funded only under certain narrow circumstances. The *Preterm* court concluded that for a state so to discriminate in the care it provided would conflict with the statutory provision that state-established standards for determining the extent of medical assistance should be "reasonable" and "consistent with the objectives" of the Medicaid Act. 42 U.S.C. § 1396a(a)(17). These objectives include furnishing medical assistance "to meet the costs of necessary medical services." 42 U.S.C. § 1396. In addition, the regulations promulgated pursuant to Title XIX provide that "the State may not arbitrarily deny or reduce the amount, duration, or scope of, such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition." 45 C.F.R. § 449.10(a)(5)(i).

We agree with the conclusion of the court in *Preterm* that limiting Medicaid assistance to life-threatening abortions "violate[s] the purposes of the Act and dis-

[5] Two other courts have also recently handed down opinions in similar cases. In *Roe v. Casey* (E.D. Pa., decided December 21, 1978, 47 L.W. 2461) the district court held that a state could not exclude medically necessary abortions as a category of care funded under Medicaid. It is not clear from the abbreviated report whether the court intended that the state pay for abortions which are medically necessary but not funded under the Hyde Amendment.

In *Frieman v. Walsh* (W.D. Mo. No. 77-4171-CV-C, decided January 26, 1979), the court similarly held that a state could not discriminate against funding medically necessary abortions under Medicaid. It did not reach the question whether the Hyde Amendment modified Title XIX, but held that even viewed as an appropriations measure, it relieved the states of the obligation of funding non-Hyde Amendment abortions because under Title XIX the states are obligated only to fund those procedures for which they will be reimbursed by the federal government.

criminate[s] in a proscribed fashion" (slip op. 9).[6] See also *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977); *Rush v. Parham*, 440 F.Supp. 383, 390-391 (N.D. Ga. 1977). The First Circuit was unanimous that the Medicaid Act requires participating states to provide "medically necessary" abortions under their plans. Judge Bownes' point of disagreement with the majority was that in his view the Hyde Amendment does not permit participating states to limit necessary medical services for abortion to those set forth in that amendment. However, we agree with the conclusion of the majority in *Preterm* that the Hyde Amendment alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment.

The Hyde Amendment is a provision which has been enacted in varying forms into the appropriations bills funding the Department of Health, Education and Welfare and the Labor Department for fiscal years 1977, 1978 and 1979. The fiscal 1978 and 1979 versions of it provide:

> "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." (See note 4 *supra*.)

Since, like the First Circuit, we have held that Title XIX prohibits discrimination in funding based on type of

[6] The Massachusetts law at issue in *Preterm* limited funding to abortions "necessary to prevent the death of the mother" and to procedures "necessary for the proper treatment of the victims of forced rape or incest." (Slip op. 2.) That Massachusetts law is similar to but somewhat more liberal than the Illinois statute here at issue, which provides funding only when an abortion is "necessary for the preservation of the life of the woman."

condition, the Hyde Amendment by singling out abortions for funding under only certain narrowly defined circumstances is in conflict with the substantive provisions of the Medicaid Act. It therefore becomes necessary to determine whether the Hyde Amendment was intended to amend the provisions of Title XIX or merely to prohibit the expenditure of federal funds. Under the latter interpretation, the states would be obligated to provide for medically necessary abortions for which federal funds would not be available.[7]

As indicated, we agree with Judge Coffin's opinion in *Preterm* and conclude that the Hyde Amendment did amend Title XIX. We are most reluctant to conclude that Congress has used an appropriations measure to effect such a change in the law, both because this reading enhances the likelihood of confusing and disruptive annual changes in the substantive law and because the Supreme Court has recently disapproved of so interpreting an appropriations bill. *Tennessee Valley Authority v. Hill*, ... U.S. ....., 46 LW 4673.

The Hyde Amendment on its face refers only to the use of federal funds. The plaintiffs have asserted that the language of the Hyde Amendment itself appears clear, so that it is—theoretically at least—unnecessary to consult the legislative history. As the preceding discussion indicates, however, what the states are required to do to comply with the requirements of Title XIX is not easily determined. Although we have concluded that the states may not exclude from coverage a whole category of medically necessary care, that conclusion is not necessarily obvious from the face of any single provision

[7] The Hyde Amendment clearly mandates abortion funding in two categories of cases not covered by the Illinois law—cases of promptly reported rape or incest, and cases in which severe and long-lasting damage to the mother's physical health would result from continuing the pregnancy. Illinois is required to fund abortions falling into these categories under its Medicaid plan and is entitled to the usual federal reimbursement. The remaining question is whether Illinois must pursuant to Title XIX provide at its own expense abortions which are medically necessary but which do not qualify for federal reimbursement under the Hyde Amendment.

of the Medicaid Act. Because not all of the obligations of the states are clearly spelled out in that statute and because those obligations arise in the context of a plan for sharing expenses between the federal and state governments,[8] it becomes appropriate to consult the legislative history of the Hyde Amendment to see what impact its provisions were intended to have on the substantive obligations of the participating states.

A fair-minded reading of the lengthy and often highly emotional floor debates in both houses of Congress during the yearly considerations of the Hyde Amendment compels the conclusion that Congress intended through this vehicle to alter the scope of Title XIX in regard to abortions. As the majority opinion in *Preterm* noted, a few Congressmen and Senators said that the amendment would simply restrict federal funds for abortions.[9] In context, however, even these remarks were apparently intended to distinguish between a prohibition on abortions (which would be unconstitutional under *Roe v. Wade, supra*), and a mere refusal to fund abortions. They do not appear to have been intended to suggest that state—but not federal—funds would be available. Moreover no one, whether supporting or opposing the Hyde Amendment, ever suggested that state funding would be required. To the contrary, the assumption was that when federal funds were withdrawn, the states, although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, would refuse to do so.[10]

[8] 42 U.S.C. § 1396b sets out the basic scheme for partial federal reimbursement of state expenditures under Medicaid.

[9] Some of these comments appear at 123 Cong. Rec. H. 6086, 6090 (June 17, 1977); 123 Cong. Rec. H. 10826-10830 (Oct. 12, 1977); 123 Cong. Rec. S. 11039 (June 29, 1977).

[10] Comments revealing that assumption appear throughout the debates, but a sample of them can be found at 123 Cong. Rec. H. 6085 (Rep. Bauman); *id.* at 6086 (Rep. Stokes); *id.* at 6088 (Rep. Eckhardt); *id.* at 6089 (Reps. Fenwick and Spellman); *id.* at 6092 (Rep. Holtzman); *id.* at 6093 (Reps. Weiss and Allen) (June 17, 1977); 123 Cong. Rec. H. 10968 (Rep. Sears) (Oct. 13, 1977); 123 Cong. Rec. S. 18583-84 (Sen. Bayh); *id.* at 18589 (Sen. Packwood) (Nov. 3, 1977); 123 Cong. Rec. S. 13672 (Sen. Brooke) (Aug. 4, 1977); 123 Cong. Rec. S. 11040 (Sen. McGovern) (June 29, 1977).

In addition, a frequently reiterated belief was that taxpayers ought not to be compelled by the federal government to finance abortions which were repugnant to them on religious or moral grounds.[11] This concern would apply with at least equal force if the tax expenditures required by federal law came from the state rather than the federal treasury. Nor is there any suggestion in the Congressional debates that the Hyde Amendment would alter the basic scheme of federal-state sharing of Medicaid expenses.[12] It is also clear that Congress was aware that its action could be construed as legislation via an appropriations bill,[13] and that this was

[11] Samples of these remarks appear at 123 Cong. Rec. H. 6085 (Rep. Obey); *id.* at 6088 (Rep. Rudd); *id.* at 6089 (Rep. Young) (June 17, 1977); 123 Cong. Rec. H. 10835 (Rep. Early) (Oct. 12, 1977); 123 Cong. Rec. S. 18584-18585 (Sen. Helms) (Nov. 3, 1977).

[12] Plaintiffs have correctly noted that Medicaid and related statutes sometimes do require state expenditures unmatched by federal funds (Br. at 63-64, note). We have no doubt of Congress' authority to condition its expenditure of Medicaid funds on the states' expenditure of funds for related purposes. However, as plaintiffs' examples indicate, when Congress has imposed such conditions, it has done so explicitly and for the apparent purpose of encouraging the states to undertake programs Congress deemed to be desirable. Not only did Congress not explicitly shift the funding obligation to the states in the Hyde Amendment, but it also clearly did not intend to encourage abortions.

[13] We do not rely on the fact that both the House and the Senate waived their rules against legislating in an appropriations bill (House Rule XXI(2); Standing Rules of the Senate, Rule 16.4) in concluding that the Hyde Amendment worked a substantive change in the law. Apparently both houses of Congress interpret those rules to mean that while a limitation on expenditures would be acceptable, any provision which imposed a duty on federal officials would go beyond a limitation and run afoul of the rules. See 123 Cong. Rec. H. 6082 (June 17, 1977). Because ascertaining when the conditions of the Hyde Amendment would be fulfilled was interpreted to impose additional duties on federal officials, only a flat ban on the use of funds for abortions was construed to be within the rules. It was in order to allow federal funds for abortions in certain limited circumstances that the rules were waived. Since a flat ban on abortion funding, although evidently within the procedural rules, would nevertheless conflict with our interpretation of Title XIX, the fact that the rules were waived, although relied upon by the defendants, is not helpful.

not the preferred method of procedure.[14]

Finally, the circumstances under which the Hyde Amendment was passed distinguish it from *Tennessee Valley Authority v. Hill, supra.* The problems the Supreme Court faced when asked to construe the appropriations for the TVA budget, including the Tellico Dam, as effecting a *pro tanto* repeal of the Endangered Species Act do not exist here. Unlike the situation in the *Hill* case, there is no question here that Congress as a body was well aware of the implications of the Hyde Amendment and agreed to them. More importantly, *Hill* involved the question of when expenditures authorized under one Act should be interpreted to repeal the sub-

[14] Early in the debate on the fiscal 1978 appropriations, Congressman Hyde spoke as follows:

> "Yesterday, remarks were made that it is unfortunate to burden an appropriation bill with complex issues, such as busing, abortion and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill. I regret that. I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid bill. A life is a life. The life of a little ghetto kid is just as important as the life of a rich person. And so we proceed in this bill."

123 Cong. Rec. H. 6083 (June 17, 1977). Subsequently, numerous other Congressmen and Senators, both opponents and proponents of the bill, indicated awareness that the amendment would have a substantive impact. See *e.g.*, 123 Cong. Rec. H. 6088 (Rep. Eckhardt); *id.* at 6090 (Rep. Mazzoli); *id.* at 6097 (Rep. Meyner) (June 17, 1977); 123 Cong. Rec. S. 11035 (Sen. Brooke) (June 29, 1977); 123 Cong. Rec. S. 19440, 19441 (Sen. Magnuson); *id.* at 19443 (Sen. Javits); *id.* at 19445 (Sen. Stennis) (Dec. 7, 1977).

stantive provisions of an entirely independent Act.[15] Here, in contrast, not only was the appropriations measure geared specifically to the substantive provisions of the affected Act, but the amendment was in the form of limiting previously authorized expenditures rather than authorizing arguably prohibited expenditures, as in *Hill*.

Under these circumstances, mindful that "[t]he doctrine disfavoring repeals * * * applies with even *greater* force when the claimed repeal rests solely upon an appropriations act,"[16] we are nonetheless convinced by the overwhelming weight of the legislative history that Congress did intend to alter the substantive requirements of Title XIX by passing the Hyde Amendment.[17] Therefore Illinois is not required by Title XIX to fund abortions other than those covered by the Hyde Amendment.

As noted, the district court did not reach the constitutional arguments raised by the parties because it

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[15] As the Supreme Court noted, implying such a repeal could wreak havoc with the legislative process.

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure."

Tennessee Valley Authority v. Hill, ... U.S. at ....., 46 LW at 4683.

[16] *Tennessee Valley Authority v. Hill*, ... U.S. at ....., 46 LW at 4683.

[17] It is established that Congress has the power to legislate substantively in an appropriations Act. *United States v. Dickerson*, 310 U.S. 554. Moreover, when as here the substantive change is a prohibition against the use of funds for previously authorized purposes, the courts have been less hostile to modifications via appropriations bills. *Eisenberg v. Corning*, 179 F.2d 275, 276 (D.C. Cir. 1949); *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973), certiorari denied, 414 U.S. 1171; *City of Los Angeles v. Adams*, 556 F.2d 40, 48-49 (D.C. Cir. 1977).

had statutory grounds for its decision. Because the constitutional issues were not considered below, and in light of the fact that our interpretation of the Hyde Amendment to modify the requirements of Title XIX may alter the constitutional considerations, it would be inappropriate for us to pass on them now. The parties should have a full opportunity to develop their positions and the district court to rule on them. *Singleton v. Wulff*, 428 U.S. 106, 120. Therefore, we remand the case for expedited consideration of the constitutional questions that remain open. This consideration should include, *inter alia*, whether the Hyde Amendment, by limiting funding for abortions to certain circumstances[18] even if such abortions are medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right. *Roe v. Wade, supra.*

On remand, the permanent injunction granted by the district court must be modified forthwith to require defendants to grant payments to plaintiff physicians and other recognized and legal medical providers for the rendition of medical services to indigent pregnant women for those abortions fundable under the Hyde Amendment. The defendants have pointed out that the challenged Illinois law applies to medical care under fully state-funded plans as well as under Medicaid (Ill. Rev. Stat. ch. 23 §§ 6-1 and 7-1; General Assistance and Local Aid to the Medically Indigent, respectively). Therefore, they assert, since the Illinois statute has so far been determined only to contravene Title XIX as altered by the Hyde Amendment, enforcement of the Illinois statute should not be enjoined as it applies to purely state-funded plans. The plaintiffs urge us to find the statute non-severable, so that its application to purely

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[18] The constraints imposed by the Hyde Amendment on medically necessary abortions which are not imposed on other kinds of medically necessary care include (1) a greater degree of potential harm from withholding treatment (the threatened damage in the case of an abortion must be "severe and long-lasting"), (2) the threatened harm must be physical, and (3) two doctors must make the determination of likely harm.

state-funded plans falls with the federally funded portion.[19]

This presents a close question that necessitates interpreting what the Illinois General Assembly would likely have done had it been able to foresee the development of this case.[20] In a similar situation the Illinois Supreme Court has held a law non-severable (*Sperling v. County Officers Electoral Board*, 57 Ill. 2d 81 (1974)), whereas in others it has not (*Vissering Mercantile Co. v. Annunzio*, 1 Ill. 2d 108 (1953); *People* ex rel. *Engle v. Kerner*, 32 Ill. 2d 212 (1965)). We have been told that the vast majority of publicly funded abortions would come under the Medicaid plan rather than the purely state plans. In these circumstances, it is not at all clear that the General Assembly would have imposed standards for funding from state plans which differ from the standards for Medicaid funding. The defendant State's official has informed us that the Illinois law "represents Illinois' understanding of Congressional purpose as reflected in the Hyde Amendments to federal welfare appropriations and the Supreme Court's delineation of the nature and extent of the qualified 'right' to abortion vis-a-vis the public funding issue * * *" (Br. 9).[21] Since the State itself has tied the challenged statute to the proper interpretation of what is required by Title XIX,

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[19] The defendants suggest that we should not consider the severability issue since the district court did not articulate this ground for its decision. However, we may affirm a district court's ruling which is correct as a matter of law even though the proper ground was not expressed. Therefore cases cited by defendants to the effect that an appellate court will not consider a ground for reversal which was not presented to the district court are inapposite.

[20] The Illinois Supreme Court has formulated the test for severability of provisions of a law as whether "it can be said that the General Assembly would not have passed the statute with the invalid portion eliminated." *People* ex rel. *Engle v. Kerner*, 32 Ill. 2d 212, 221-222 (1965).

[21] When the Illinois law was passed, the version of the Hyde Amendment then in effect (fiscal year 1977) provided funds for abortions only when the life of the mother was endangered.

evidently it intended that recipients of purely state funds be treated consistently with those who receive Medicaid funds.

In light of this history of the challenged law, and in view of the fact that the resolution of the constitutional issues will apply equally to the state-funded and the Medicaid-funded plans,[22] we conclude that the various provisions of the law should not be severed and that the modified injunction should apply to all publicly funded abortions.

Vacated and remanded for further proceedings consistent herewith.[23]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[22] If the Hyde Amendment is determined to violate the guarantee of equal protection as it inheres in the Due Process clause of the Fifth Amendment, it appears likely that similar state action would violate the Fourteenth Amendment.

[23] Our mandate shall issue this day.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 13, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

Nos. 78-1669, 78-1709, 78-1787,
78-1890, 78-1891, 78-2029

DAVID ZBARAZ, M.D., et al.,

Plaintiffs-Appellees,

v.

ARTHUR F. QUERN, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77-C-4522—**Alfred Y. Kirkland**, *Judge.*

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in these causes appealed from be, and the same is hereby, VACATED, with costs, and REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 13, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Nos. 78-1669, 78-1709, 78-1787,
78-1890, 78-1891, 78-2029

DAVID ZBARAZ, M.D., et al.,

Plaintiffs-Appellees,

v.

ARTHUR F. QUERN, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77-C-4522—**Alfred Y. Kirkland**, *Judge*.

This matter comes before the court for its consideration upon the filing herein of the following documents:

1. The "PLAINTIFFS-APPELLEES' MOTION TO RECALL THE MANDATE, FOR A PARTIAL STAY OF THE MANDATE, AND FOR OTHER RELIEF" filed herein on February 26, 1979 by counsel for the plaintiffs-appellees.
2. The "PLAINTIFFS-APPELLEES' MEMORANDUM IN SUPPORT OF MOTION TO RECALL THE MANDATE, FOR A PARTIAL STAY OF THE MANDATE, AND FOR OTHER RELIEF" filed herein on February 26, 1979.
3. The "INTERVENING DEFENDANTS-APPELLANTS' OBJECTION TO PLAINTIFFS-APPELLEES' MOTION FOR A RECALL OF MANDATE, FOR A PARTIAL STAY OF MANDATE, AND TO VACATE THE PERMANENT INJUNCTION OF THE DISTRICT COURT" filed herein on March 1, 1979 by counsel for the intervening defendants-appellants.
4. The "DEFENDANT-APPELLANT QUERN'S OBJECTION TO PLAINTIFFS-APPELLEES' MOTION FOR A RECALL OF MANDATE, FOR A PARTIAL STAY OF MANDATE, AND TO VACATE THE PERMANENT INJUNCTION OF THE DISTRICT COURT" filed herein on March 9, 1979 by counsel for the defendant-appellant.
5. A copy of the district court's order of March 8, 1979, filed herein on March 12, 1979 by counsel for the defendant-appellant.

On consideration thereof,

IT IS ORDERED that the plaintiffs-appellees' motion to retax the costs on these appeals is hereby GRANTED. Each party is to bear its own costs on these appeals. Therefore, the Bill of Costs will be disallowed.

IT IS FURTHER ORDERED that the plaintiffs-appellees' motion to make technical corrections in the opinion is hereby GRANTED. References in the court's opinion of February 13, 1979, to Appeal Nos. 78-1787 and 78-2029 will be deleted in the caption and at the tops of each page. Those two appeals were dismissed prior to the oral argument of this matter,

IT IS ALSO FURTHER ORDERED that the plaintiffs-appellees' motion to recall the mandates, and for a partial stay of mandates, and for vacation of the district court's injunction entered on February 15, 1979, is hereby DENIED in its entirety.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc.,

Defendant.

No. 77 C 4522.

MEMORANDUM OPINION AND ORDER
[May 15, 1978]

This matter is before the Court on the following motions: (1) defendant's Motion to Dismiss the Complaint for Want of Jurisdiction; (2) a Motion to Intervene presented by Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.; (3) plaintiffs' Motion to Proceed as a Class; (4) the parties' cross-motions for summary judgment on injunctive claims and on the merits; and (5) the parties' motions regarding the notice requirements in this case.

The Complaint seeks an injunction against the enforcement of Illinois P.A. 80-1091 (the "Act") which places restrictions upon Illinois medical assistance funding for certain types of abortions. Jurisdiction of the Court is invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The Court considers the parties' motions in order.

I. *DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION*

Defendant first moves to dismiss this action for want of jurisdiction. Defendant argues that plaintiffs lack standing to bring suit because they have no stake in the outcome of this litigation. This Court does not agree.

On April 25, 1978, this Court granted plaintiffs leave to add a party plaintiff to this suit: a pregnant medical assistance recipient who has been unable to obtain an abortion because many clinics are currently turning away such recipients until the scope of the Act has been determined. The recipient further states that those clinics which are currently performing abortions are unable to assist her because of the demand created by the shortage of available clinics.

A plaintiff has standing to sue if plaintiff can demonstrate: (1) that he has a concrete, adversary stake in the outcome of the litigation so that he will suffer an "injury in fact" if the statute in question is enforced; and (2) that he is asserting his own legal rights. *Warth v. Seldin*, 422 U.S. 490 (1975); *Wynn v. Scott*, No. 75 C 3975 (N.D. Ill. April 12, 1978) (three-judge court).

In this action, both a pregnant medical assistance recipient unable to obtain an abortion and a physician regularly performing abortions for such individuals

have standing to challenge a law which is alleged to limit funding of abortions in an unclear manner. *Singleton v. Wulff*, 428 U.S. 106 (1976).

Although the Act has not yet been enforced, plaintiffs here allege that they are potential recipients of or providers of abortion services which would be funded by the state but for the enactment of the Act. The threatened financial impact of the Act is reasonably direct and certain. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Plaintiffs clearly have standing to bring this suit.

Accordingly, defendant's Motion to Dismiss for Want of Jurisdiction is denied.

II. *MOTION TO INTERVENE*

This Court is next asked to decide whether two doctors may intervene to represent the interests of five "classes" of individuals.

Applicants seek to intervene pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. An application for non-statutory intervention as of right must meet four requirements. The applicants must: (1) file a timely application; (2) have an interest in the subject matter of the action; (3) demonstrate that the protection of their interests may be impaired by disposition of the action; and (4) show that their interests are not adequately represented by an existing party. 3B Moore's Federal Practice ¶24.09-[1] at 24-285 (2nd ed. 1977). This Court finds that applicants for intervention have met each of these requirements.

Applicants filed a timely application for intervention. Applicants filed their petition for intervention on

December 12, 1977, six days after the original filing of the Complaint. The filing of the petition preceded defendants' response to the Complaint and all other proceedings. This Court finds that the application for intervention was timely.

Applicants have demonstrated that they have an interest in the subject matter of this action. First, applicants have standing to sue, *except* insofar as they seek to represent the interests of unborn children, *Planned Parenthood v. Danforth*, 482 U.S. 52 (1976). Applicants' standing alone is a sufficient basis for a finding that applicants have an "interest" in the action, *Rosado v. Wyman*, 397 U.S. 397 (1970).

Applicants have also demonstrated that protection of their interests may be impaired by disposition of this suit. In applicants' absence this Court may render a decision which will impair their economic and other interests by allowing funding of more types of abortions than the Act presently permits.

Finally, applicants have shown that their interests may not be adequately represented by existing parties. Applicants here have demonstrated that defendant has in the past opposed enactment of the statute he is now called upon to uphold. Under these circumstances, applicants have met their burden of demonstrating that representation "may be" inadequate, *Trobovich v. United Mine Workers*, 404 U.S. 528 n. 10 (1972).

Accordingly, applicants Jasper Williams, M.D. and Eugene Diamond, M.D. may intervene in this action. This Court will consider their briefs in deciding the remaining issues in this case.

III. *PLAINTIFFS' MOTIONS TO PROCEED AS A CLASS*

Plaintiffs next move for certification of two plaintiff classes consisting of:

> All registered and licensed physicians in Illinois who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for medical services under the Illinois Medicaid, state funded General Assistance and Aid to the Medically Indigent Programs, Ill. Rev. Stat. ch. 23 Art. V-VIII (the "Illinois medical assistance programs").

and

> All pregnant women eligible for the Illinois Medical Assistance Programs [Ill. Rev. Stat. ch. 23 Art. V-VIII] for whom an abortion is medically necessary, but not necessary for the preservation of their lives, and who wish such abortions performed.

Defendant opposes certification of these classes on the following grounds: (1) that class definitions do not include a statement that members of the class have suffered injury as a result of the Act and that even if the definition were amended to include language about injury, the class representatives could not allege that they had been so injured; (2) that class definitions are overbroad because they include two state programs which are not totally state funded; and (3) that there is an insufficient showing that the numerosity requirements of Rule 23 have been satisfied. This Court does not agree.

Rule 23, Federal Rules of Civil Procedure establishes the prerequisites to the maintenance of a class action. Under Rule 23(b)(2), a class action is appropriate when "the party opposing the class has acted or refused to act

on grounds generally applicable to the class" and the representative is seeking "final injunctive relief or corresponding declaratory relief."

For an action to proceed under Rule 23(b)(2), however, the requirements of Rule 23(a) must also be satisfied. Rule 23(a) requires the putative class to: (1) be "so numerous that joinder of all members is impracticable"; (2) present "questions of law or fact common to the class"; (3) have claims of the representative parties that "are typical of the claims . . . of the class"; and (4) have representative parties who "will fairly and adequately protect the interests of the class." Plaintiffs have the burden of proving that a case is appropriately a class action and meets all the requirements of Rule 23, *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976).

A. *Numerosity*

Plaintiffs have adequately shown that the classes are "so numerous that joinder of all members is impractical", Rule 23(a)(1). The affidavits of Drs. Martin Motew, David Zbaraz, Philip Rosenow and Louis Keith show that at six hospitals in Chicago, over 51 physicians perform therapeutic abortions for indigent women eligible for medical assistance program benefits whose abortions are not necessary to preserve their lives. Plaintiffs have also submitted statistical summaries from which it may be inferred that the number of physicians throughout Illinois far exceeds 51.

Further, plaintiffs have demonstrated that during fiscal 1977, over 24,000 abortions were performed for pregnant women eligible for aid under Illinois medical assistance programs and that thousands of such abortions were therapeutic abortions not necessary to preserve the woman's life.

Under these circumstances, this Court finds that both plaintiff classes satisfy the numerosity requirements of Rule 23. *See Robertson v. National Basketball Association*, 389 F.Supp. 867 (S.D. N.Y. 1975).

B. *Common Questions of Law or Fact*

Rule 23(a)(2) requires that there be a question of law or fact common to the class, *Pollion v. Power*, 47 F.R.D. 331 (N.D. Ill. 1969). All class members here challenge the Act insofar as it denies coverage for certain therapeutic abortions on the grounds that it violates Title XIX of the Social Security Act, 42 U.S.C. § 1396a et seq. and the Ninth and Fourteenth Amendments. These questions predominate the litigation and are sufficient to meet the requirement that there be common questions of law or fact.

C. *Typicality*

Rule 23(a)(3) requires that the claims of representative plaintiffs be typical of the claims of the class. This requirement has been interpreted to mean that there must be no express conflict between representative parties over litigation issues, *Mersay v. First Republic Corporation of America*, 43 F.R.D. 465 (S.D. N.Y. 1968). In this action, the claims of named plaintiffs and the class are the same: challenges to the termination of reimbursement for certain types of therapeutic abortions. Plaintiffs have satisfied the requirements of Rule 23(a)(3).

D. *Adequacy of Representation*

Rule 23(a)(4) requires that class representatives fairly and adequately represent the interests of the class. This

requirement has been interpreted to mean that class representatives must have an interest in the outcome of the litigation and be represented by attorneys who are qualified and able to conduct the litigation, *Shulman v. Ritzenbert*, 47 F.R.D. 202 (D. D.C. 1960). The representative physicians here have both pecuniary and professional interests in providing medical services which may no longer be funded under the Act. The representative pregnant woman has an interest in obtaining an abortion but would be financially unable to obtain one if the Act remains in effect. Further, plaintiffs' attorneys have documented their extensive experience in the area of class litigation.

This Court finds that plaintiffs have satisfied the requirements of Rule 23(a)(4).

This Court further finds that plaintiffs have adequately shown that defendant has failed to act on grounds generally applicable to the class, making final injunctive relief or corresponding declaratory relief appropriate, Rule 23(b)(2), Federal Rules of Civil Procedure.

Accordingly, plaintiffs' Motions to Proceed as a Class are granted. This Court hereby certifies the classes as hereinabove described.

IV. *THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT*

The parties now move for summary judgment in their favor on the issue of the validity of the Act. The Court considers the statutory issues first.

A. *The Act and Title XIX of the Social Security Act*

Plaintiffs first argue that Illinois' failure to cover "medically necessary" abortions under the Illinois medical assistance programs violates the Social Security Act and implementing regulations. This Court agrees.

The Illinois medical assistance programs are designed to "furnish medical assistance to meet the costs of necessary medical services," 42 U.S.C. § 1396a. Eligible recipients are the "categorically needy" who are recipients of cash welfare benefits and may include the "medically needy" whose medical expenses exceed their available income. Persons eligible for aid must be covered for the following categories of services: the "categorically needy" must be provided funds for: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, and (4) physicians' services, whether in the office, patient's home, hospital or elsewhere, and the "medically needy" must be covered for at least the first five services listed in 42 U.S.C. § 1396d(a). Illinois provides all categories of care specified in Title XIX.

Once a state has opted to participate in the program, Title XIX requires that the state establish "reasonable standards" for determining the extent to which assistance will be given "consistent with the objectives of [the program]." Federal regulations further provide that the state may limit services "based on such criteria as medical necessity," 42 C.F.R. § 449.10(a)(5)(i) [45 C.F.R. § 249.10(a)(5)(i)].

Illinois may not arbitrarily deny or reduce the amount, duration or scope of services to an otherwise eligible individual solely because of the diagnosis or type

of condition, 42 C.F.R. § 449.10(a)(5)(i), [45 C.F.R. § 249.10(a)(5)(i)]. *See also White v. Beal*, 413 F.Supp. 1141 (E.D. Pa. 1976).

It is undisputed that the Act authorizes reimbursement to physicians who perform abortions to "preserve" the life of the woman or who induce miscarriages or premature births to "preserve" the life of the mother or her unborn child. It is also clear that Illinois may permissibly withhold reimbursement to physicians who perform abortions for non-medical reasons alone (non-therapeutic abortions), *Beal v. Doe*, 97 S.Ct. 2366 (1977); *Maher v. Doe*, 97 S.Ct. 2391 (1977), and that Illinois does so withhold reimbursement.

At issue here is whether an abortion "necessary for the preservation of the life" of the mother is co-extensive with a "medically necessary" abortion as mandated by Title XIX of the Social Security Act. Plaintiffs' briefs, affidavits and exhibits provide examples of the circumstances under which a physician might perform a therapeutic abortion deemed "medically necessary" but not clearly "life preserving." This Court finds that under the Act it is unlikely that the state would reimburse physicians performing abortions for indigent women whose lives could be shortened or threatened rather than terminated by carrying the fetus to term.

This Court notes that plaintiffs have shown that a pregnant woman's life could be threatened if she were diabetic, suffering from heart disease, hypertension, or sickle cell anemia and was not motivated to continue her pregnancy. (See Depp Affidavit at 6).

Since the medical assistance program is designed to provide *necessary* medical services for the needy, this Court holds that Illinois must provide funds for all

therapeutic abortions. Plaintiffs have adequately shown that necessary medical services are *more* than services to save a life in peril. Defendant may not pick and choose among medically necessary treatments for medical assistance recipients, but must provide funds for treatment when, in the discretion of the attending physician, such treatment is medically indicated. The definition of medical necessity may not differ when the condition treated is pregnancy. *See Beal v. Doe, supra*.

This Court recognizes the problems presented by allowing the physician to define medical necessity. The problems are highlighted by plaintiffs' own argument that it is medically safer to have an abortion in the first and most of the second trimester than to continue the pregnancy. Such an argument could convert all first trimester and most second trimester abortions to medically necessary (therapeutic) abortions. The attending physician has a great deal of discretion, but that discretion is not unfettered. The state may not unduly interfere with the physicians' determinations but neither may it ignore the basis upon which the decision is made.

B. *The Hyde Amendment*

Congress' enactment of the new Hyde Amendment (Section 209 of Pub. L. 95-205) would not change the result here reached. That amendment to the Departments of Labor and Health, Education and Welfare Appropriations Act for 1978 provides that:

> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported

promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Limitations on the use of funds in an appropriations bill will not suspend statutory obligations. *See New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. of Claims 1966).

This Court finds that the new Hyde Amendment does not affect the result reached in Part A, *supra*.

C. *The Act and the Constitution*

This Court's resolution of the issues on statutory grounds makes consideration of plaintiffs' constitutional challenges unnecessary.

D. *Summary*

Accordingly, this Court holds that plaintiffs are entitled to summary judgment on their claims that the Act violates Title XIX of the Social Security Act. This Court hereby orders that defendants be permanently enjoined from:

(1) enforcing Illinois P.A. 80-1091 to deny payments under the Illinois medical assistance programs to plaintiffs Zbaraz, Motew, and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for therapeutic abortions, or to deny such payments on behalf of any such indigent pregnant women for such abortions;

(2) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that therapeutic abortions are not, or will not be, a covered (reimbursable) service under the Illinois medical assistance programs.

As used herein:

(a) "recognized and legal medical providers" means all persons or institutions in Illinois who are certified to obtain reimbursement for medical services;

(b) The "Illinois medical assistance programs" means the Medicaid, state-funded General Assistance, and Aid to the Medically Indigent programs, established pursuant to Ill. Rev. Stat., ch. 23, Arts. V-VIII;

(c) "Indigent pregnant women" means pregnant women eligible for assistance under the Illinois medical assistance programs;

(d) "Therapeutic" means medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health.

Defendant's Motion for Summary Judgment is denied.

V. *NOTICE REQUIREMENTS*

This Court's resolution of prior motions makes consideration of the parties' arguments regarding notice requirements unnecessary.

VI. *CONCLUSION*

Defendant's Motion to Dismiss for Want of Jurisdiction is denied.

The Motion to Intervene by Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. is granted.

Plaintiffs' Motions to Proceed as a Class are granted as above described.

Plaintiffs' Motion for Summary Judgment is granted and a permanent injunction is entered as described above.

Defendant's Motion for Summary Judgment is denied.

This Court's resolution of prior motions makes consideration of the parties' arguments regarding notice requirements unnecessary.

ENTER: /s/ ALFRED Y. KIRKLAND, *Judge*

DATED: MAY 15, 1978

[Exhibit A omitted]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc.,

Defendant.

No. 77 C 4522.

MEMORANDUM OPINION
[April 29, 1979]

Plaintiffs brought this class action[1] under 42 U.S.C. Section 1983 to enjoin enforcement of a 1977 Illinois

[1] The classes certified by the district court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs.

statute withdrawing medical assistance funding in Illinois for all abortions except those "necessary for the preservation of the life of the pregnant woman." P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23, Sections 5-5, 6-1, 7-1.[2] Plaintiffs are two doctors who perform medically necessary, but not necessarily life-preserving abortions for indigent women; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman for whom an abortion is medically

[2] Those sections provide, in relevant part:

> Sec. 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

necessary but not necessary for the preservation of her life. Defendant Arthur Quern is the Director of the Illinois Department of Public Aid, the state agency responsible for administering Illinois medical assistance programs. Intervenor-defendants include two doctors and the United States.

The complaint alleged that P.A. 80-1091 violated plaintiffs' rights under the Social Security Act, 42 U.S.C. Section 1396 et seq., and the Ninth and Fourteenth Amendments to the United States Constitution. Plaintiffs sought both declaratory and injunctive relief. The case was originally assigned to Judge Kirkland. On December 21, 1977, he ordered the proceedings stayed pending an interpretation of P.A. 80-1091 by an Illinois state court. Reasoning that the Illinois statute could be construed to be consistent with the Social Security Act, Judge Kirkland decided the exercise of federal jurisdiction at the time would be imprudent. He therefore merely entered and continued plaintiffs' motion for preliminary relief. (Memorandum Opinion and Order of December 21, 1977, at 3-5).

Plaintiffs appealed and the Seventh Circuit reversed. *Zbaraz v. Quern*, 572 F.2d 582 (7th Cir. 1978). In its ruling, the Court of Appeals declined to decide the merits of plaintiffs' motion for a temporary restraining order and/or preliminary injunction. Instead, the court remanded the case to the district court for expeditious consideration of the question of preliminary relief.

On remand, Judge Kirkland held that by failing to cover "medically necessary" abortions, P.A. 80-1091 violated the Social Security Act and its implementing regulations. The court reasoned that Illinois' funding of only "life-preserving" abortions fell short of its responsibilities under Title XIX to establish "reasonable stand-

ards . . . for determining . . . the extent of medical assistance under the plans which . . . are consistent with the objectives of [the Medicaid program]," 42 U.S.C. Section 1396(a)(17). The court noted that the prime objective to Medicaid is to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. Section 1396. (Memorandum Opinion of May 15, 1978, at 8-11).

In his decision, Judge Kirkland also considered the impact of the Hyde Amendment on a state's responsibilities under Title XIX. The Hyde Amendment, first enacted as a rider to the 1977 fiscal year budget for the Department of Health, Education and Welfare, provides:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Section 210 of Pub. L. 95-480; 92 Stat. 1586, Oct. 18, 1978. Judge Kirkland interpreted the Hyde Amendment as a prohibition on the use of federal funds rather than a substantive amendment to the Social Security Act. A state's obligations under Title XIX to fund medically necessary abortions, Judge Kirkland thus concluded, survived passage of the Hyde Amendment. Judge Kirkland issued a permanent injunction restraining defendants from enforcing P.A. 80-1091 to deny payments under the Illinois medical assistance programs

for therapeutic abortions. (Memorandum Opinion of May 15, 1978, at 11-12).

Defendants appealed and again the Seventh Circuit reversed. *Zbaraz v. Quern*, ... F.2d ..... , No. 78-1669, February 13, 1979. Following the lead of the First Circuit Court of Appeals in *Preterm, Inc. v. Dukakis*, ... F.2d ..... (1st Cir. Nos. 78-1324, 78-1325, and 78-1326, decided January 15, 1979), the court held that the Hyde Amendment, by singling out abortions as a category of care which would be funded only under certain narrow circumstances, conflicted unavoidably with Title XIX. Despite its seemingly unambiguous language and its location in an appropriations measure, therefore, the Seventh Circuit concluded that the Hyde Amendment was not just a limitation on the use of federal funds, but an amendment to Title XIX as well. (Slip Op. at 6). Since the Amendment removed all but a narrow category of abortions from Medicaid coverage, it effectively permitted states also to withhold funds from non-Hyde Amendment abortions. (Slip. Op. at 10).

The Court of Appeals recognized the constitutional questions raised by its holding[3] and remanded the case

[3] The Seventh Circuit included in its mandate a directive to pass on the constitutionality of the Hyde Amendment, even though plaintiffs attack only the legality of an Illinois statute. After remand, therefore, the United States was permitted to intervene pursuant to 28 U.S.C. Section 2403(a). In its brief in support of the constitutionality of the Hyde Amendment, the United States suggested that the Seventh Circuit "viewed the federal and state legislation as inextricably intertwined." (Brief for the United States, at 4). Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute,

(Footnote continued on following page)

to the district court with directions to modify the permanent injunction and to decide the constitutional questions.[4] (Slip. Op. at 11).

Pursuant to the Seventh Circuit's mandate, Judge Kirkland modified his permanent injunction to require Illinois to fund under its medical assistance programs abortions which fall within the scope of the Hyde Amendment exceptions. (Minute Order entered February 15, 1979). Judge Kirkland set a briefing schedule, but then determined that for medical reasons he would be unable to give the case the "expeditious consideration" ordered by the Seventh Circuit. The case was reassigned to us on April 18, 1979.

[3] *continued*
the same analysis applies to the Hyde Amendment and the relief granted will encompass both laws. We note that although the Fifth Amendment does not contain an express Equal Protection Clause, its Due Process Clause has been construed to incorporate equal protection guarantees. Weinberger v. Salfi, 422 U.S. 749, 770 (1975); Richardson v. Belcher, 404 U.S. 78, 81 (1971).

[4] The Seventh Circuit instructed the district court to determine whether the withholding of funds for "medically necessary" abortions violated the constitution. (Slip Op. at 11). Prior to P.A. 80-1091, Illinois funded "therapeutic" abortions, defined as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." State of Illinois Dept. of Public Aid—Medical Assistance Program Handbook for Physicians, January, 1976, A-204. The Seventh Circuit adopted this definition of "therapeutic" without addressing the question of whether it was broader than "medically necessary." Judge Kirkland treated the two as synonymous. (See Order of May 15, 1978, at 10). Whether the terms "medically necessary" and "therapeutic" are coextensive is a question that is not merely of academic significance. If, by attacking the constitutionality of P.A. 80-1091, plaintiffs are advocating a return to the status quo ante, then presumably a decision in their favor would result in the funding of all "therapeutic" abortions. But as we read the complaint, plaintiffs seek funding for "medically necessary" abortions, whether or not that is broad enough to include all "therapeutic" abortions. This reading harmonizes with plaintiffs' theory of the case—that by funding "medically necessary" operations other than abortions, Illinois is denying plaintiffs equal protection of the laws. Accordingly, we will treat the action as an attack on Illinois' failure to fund "medically necessary" abortions.

Now pending are the parties' cross-motions for summary judgment and plaintiffs' motion for a temporary restraining order. The latter motion is a response by plaintiffs to the announced intention of the Illinois Department of Public Aid to deny reimbursements for all abortions except those which it is required to fund by Judge Kirkland's modified injunction—that is, abortions still covered under the Hyde Amendment—beginning May 1. For the reasons which follow, we will grant partial summary judgment for both plaintiffs and defendants.

Although plaintiffs raised a number of constitutional issues in their complaint,[5] their principal argument is that, by imposing restrictions on the public funding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 violates their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the

[5] Plaintiffs also alleged that P.A. 80-1091 violated the Establishment and Free Exercise Clauses of the First Amendment to the Constitution made applicable to the states by the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. (Complaint, par. 22(d)). Plaintiffs' due process claim rests on their argument that the statute disrupts "the carefully constructed balance of constitutional interests Wade and its progency established." (Memorandum in Support of Motion for Summary Judgment, at 22). We believe this contention is subsumed under their equal protection challenge, and we will not treat it separately in this opinion.

United States Constitution.[6] The framework for analyzing claims of alleged deprivations of equal protection is now well-established:

> We must decide, first, whether [the statute] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination. . . .

San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973).

Relying on *Roe v. Wade*, 410 U.S. 113 (1973) and subsequent abortion decisions, plaintiffs contend that strict judicial scrutiny is appropriate here because a fundamental right is implicated. In *Roe*, the Supreme Court struck down a Texas statute that made criminal the performance or procurement of an abortion unnecessary to save a mother's life. The Texas legislation was constitutionally infirm, the Court held, because for every stage of a woman's pregnancy, it subordinated the woman's right to privacy, a right which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," to the state's interests in preserving maternal health and promoting fetal life. 410 U.S. at 153. The Court emphasized, however, that

[6] Plaintiffs have also challenged as unconstitutional the reporting requirement for rape victims. None of the plaintiffs, however, have asserted any personal stake in the determination of this issue. Where, as here, a statute contains separable provisions, a person may challenge only those provisions which operate to injure him, and may not challenge those provisions that cause him no harm. *See* Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974), *cert. denied* 420 U.S. 962 (1975).

although the right of personal privacy "includes the abortion decision . . . this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. *See also, Doe v. Bolton*, 410 U.S. 179, 189 (1973).

Thus, the right recognized in *Roe* is not an affirmative right to an abortion, but is simply a right to make and effectuate the abortion decision, at least in the first trimester of pregnancy, free from governmental regulation. During the second trimester, a state may restrict the effectuation of that decision only in a manner that reasonably promotes the health of the mother. After the fetus has achieved viability, a state may constitutionally proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164, 165.

Plaintiffs argue here that by erecting a "substantial impediment to poor women's obtaining medically necessary abortions," P.A. 80-1091 restricts the effectuation of their decision to "bear or beget a child," and thereby triggers strict scrutiny. We believe this argument has been explicitly rejected by the United States Supreme Court in *Maher v. Roe*, 432 U.S. 464, 470 (1977), and is therefore foreclosed to plaintiffs here. In *Maher*, the Supreme Court held that the Constitution does not require a state participating in Social Security to pay for nontherapeutic abortions although it pays the expenses of childbirth. Plaintiffs in *Maher* argued that the Connecticut medical assistance scheme infringed upon their fundamental rights as announced in *Roe v. Wade*. Rejecting this contention, the Court observed:

> [Roe] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds.
>
> * * * * *

> The indigency that may make it difficult—and in some cases, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.
>
> * * * * *
>
> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

432 U.S. at 474, 475.

As in *Maher*, plaintiffs here will encounter difficulty effectuating their decision to terminate a pregnancy not because of any state regulation, but because of their indigency. *Maher* compels the conclusion, therefore, that P.A. 80-1091 impinges upon no fundamental right and should not be subjected to strict judicial scrutiny.[7]

In further support of their argument that strict scrutiny is appropriate here, plaintiffs analogize to the case of *Shapiro v. Thompson*, 394 U.S. 618 (1969). There the Supreme Court declared unconstitutional various state statutory provisions which denied welfare assistance to persons who had not satisfied one year residency requirements, but who were otherwise eligible for welfare benefits. The Court reasoned that by treating indigents who had resided in the state less than a year differently from those who had satisfied the residency requirement, the state was penalizing indigents' rights to migrate, or travel interstate. Since the right to travel interstate was deemed "fundamental," the Court subjected the statutes to strict scrutiny. Finding no compelling justification for treating one year residents differently, the Court concluded that the statutes were unconstitutional. The Court noted that if the purpose of the provisions was to deter migration, or prevent an influx of indigents seeking higher welfare benefits, those purposes were "constitutionally impermissible." 394 U.S. at 631.

[7] Plaintiffs apparently do not argue that P.A. 80-1091 creates a "suspect classification." This argument would also be unavailing under *Maher*. There the Supreme Court stated that, "This Court has never held that financial need alone identifies a suspect class for purposes of Equal Protection." 432 U.S. at 470.

In this case, plaintiffs contend that Illinois is penalizing indigent women who desire to exercise their right to effectuate the abortion decision. We believe that again *Maher* disposes of this argument. As the *Maher* Court observed:

> [T]he claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right-to-travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.

432 U.S. n.8 at 475. Since there is no fundamental right to a publicly funded abortion, the analogy to *Shapiro* fails, "penalty analysis" does not apply, and strict scrutiny is unnecessary.

Our determination that P.A. 80-1091 should not be subjected to strict judicial scrutiny, however, does not resolve the question of the statute's constitutionality. Whenever a statute treats different classes of individuals differently, that legislative line-drawing is properly the subject of judicial examination. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Here, since indigent women in medical need of abortions are treated differently than indigent women in medical need of

other surgical procedures, we must subject the statute to the rational relationship test. Under this test, the statute passes constitutional muster only if we can conclude that the legislative classification rationally furthers some legitimate, articulated state purpose. *Id.* As the Supreme Court observed in *Maher*, in applying the identical test,

> The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.

432 U.S. at 469-70.

The various defendants have suggested that the statute is supported by the state's legitimate interests in "fiscal frugality" and in protecting fetal life through the encouragement of childbirth. While the allocation of limited public funds is a legitimate interest of the state, *see generally, Dandridge v. Williams*, 397 U.S. 471, 487 (1970), we do not believe that the Illinois funding policy is rationally related to this purpose. In fact, the record in this case supports the contrary conclusion that the costs of prenatal care, childbirth and postpartum care are substantially higher than the cost of abortions.[8] All of the births in question involve women who have encountered complications in their pregnancies, which would presumably increase the cost of needed medical care. Of course, if the newborn child then receives

[8] Plaintiffs have produced convincing statistical evidence that the average State payment for an abortion is approximately $145.00, compared to an average cost to the State of $1,372.00 for funding a childbirth.

public aid, the cost differential is even greater. The Illinois General Assembly was well aware of these potential cost differences, as shown by the remarks of Senator Lemke, Senate sponsor of P.A. 80-1091:

> My people don't want abortions being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly as long as it's properly used.

Debate on H.B. 333, Illinois Senate, June 27, 1977. In short, P.A. 80-1091 was not, and could not be, motivated by economic concerns.

The other state interest offered in support of the state classification is the protection of the fetus through the encouragement of childbirth. The Supreme Court has recognized this as a legitimate state interest in some circumstances. *See Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Roe v. Wade*, 410 U.S. 113 (1973). In *Maher*, the Court held that Connecticut could encourage "normal childbirth" by subsidizing the costs incident to childbirth while, at the same time, refusing to expend funds for *nontherapeutic* (purely elective) abortions. The Connecticut statute differed from the Illinois statute challenged here because it provided the funding of "medically necessary" abortions. We believe this distinction to be crucial to the determination of this case.

Under *Maher*, a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary.[9] This approach, which

[9] Poelker v. Doe, 432 U.S. 519 (1977), does not require a contrary result. There a woman challenged a city policy that

(Footnote continued on following page)

recognizes that the fetus is being carried within a living, human being, is consistent with Supreme Court decisions which suggest that the interest in the fetus cannot be isolated from the interest in the health of the mother. *See generally, Roe v. Wade*, 410 U.S. at 159; *Colautti v. Franklin*, 99 S.Ct. 675, 688 (1979).[10]

[9] *continued*
prohibited the performance of abortions in city-owned hospitals for reasons other than to save the mother from grave physiological injury or death. When plaintiff was examined by hospital physicians, however, physicians could not find "*any* medical reasons to justify an abortion," such as "severe sickness of the patient." 515 F.2d at 543. Accordingly, the Court of Appeals treated the case as one where plaintiff demanded a "nontherapeutic" abortion. 515 F.2d at 545. When the case was appealed, the Supreme Court adopted the lower court's characterization of the issue in upholding the city policy. 432 U.S. at 521. Because the Court viewed plaintiff's argument as an attack on the city's withholding of city-owned facilities for elective, or nontherapeutic abortions, *Maher* of course controlled. In this case, the plaintiff class is defined in terms of indigent women for wnom abortions are medically necessary. We agree with plaintiffs that the Supreme Court could not have intended in its per curiam *Poelker* decision to obliterate the distinction it had carefully drawn in *Maher* between medically necessary and nontherapeutic abortions. We note, however, that at least two district courts have given Poelker v. Doe the sweeping interpretation we reject here. Doe v. Mundy, 441 F. Supp. 447, 451-52 (E.D. Wis. 1977); Frieman v. Walsh, No. 77-4171-CV-C (W.D. Mo. filed January 26, 1979).

[10] Colautti v. Franklin, 99 S.Ct. 675 (1979) involved a challenge to a Pennsylvania statute which subjected a physician who performed an abortion to potential criminal liability if he failed to utilize a statutorily prescribed technique when the fetus was "viable," or when there was sufficient reason to believe that the fetus was viable. The Court stated:

> Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word

(Footnote continued on following page)

As a consequence of the state's viewing the fetus apart from the mother, the mother may be subjected to considerable risk of severe medical problems, which may even result in her death. Under the Hyde Amendment standard, a doctor may not certify a woman as being eligible for a publicly funded abortion except where "the life of the mother would be endangered . . . or . . . where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ." Most health problems associated with pregnancy would not be covered by this language, (Affidavit of Dr. Oren Richard Depp, p. 10, affidavit of Dr. David Zbaraz), and those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother (affidavit of Dr. Depp, pp. 4-5). At the earlier stages of pregnancy, and even at the later stages, doctors are usually unable to determine the degree of injury which may result from a particular medical condition (*Id.* at 4). The effect of the new criteria, then, will be to increase substantially maternal morbidity and mortality among indigent pregnant women (*Id.* at 12).[11]

[10] *continued*
"necessary" suggests that a particular technique must be indispensable to the woman's life or health—not merely desirable—before it may be adopted.

* * * * *

Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity.

[11] Moreover, the new Illinois criteria completely ignore the very serious threats to an indigent pregnant woman's psychological or psychiatric health that may make an abortion

(Footnote continued on following page)

We cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Supreme Court was faced with a challenge to an Arizona statute which required one year's residence in a county as a condition to receiving non-emergency hospitalization or medical care at the county's expense. In striking down the state statute as infringing on the fundamental right to interstate travel, the Supreme Court stated:

> Evaro was an indigent person who *required* continued medical care for the preservation of his health and well being . . ., even if he did not require immediate emergency care. The State could not deny Evaro care just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more *cruel* in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.

415 U.S. at 260-61 (emphasis added). Like the Arizona statute in *Maricopa County*, the Illinois statute as

[11] *continued*
medically necessary. One doctor has estimated that approximately 15 per cent of a representative group of women desiring abortions have a psychiatric need for an abortion. He also concluded that indigent women are more likely than are non-indigent women to suffer adverse mental health consequences from unwanted pregnancy. (Affidavit of Dr. Peter Barglow, at 4, 6).

modified will deny needed medical aid to indigent mothers until the point when a doctor is able to certify that the mother's life is endangered or when severe and long-lasting physical health damage[12] appears certain to occur. Action that the Supreme Court characterized as "cruel" in *Maricopa County* can hardly be considered as a permissible side effect of a "legitimate" state interest in the present case.

As the Supreme Court recognized in *Roe*, however, the state's interest in promoting fetal life grows with the length of the pregnancy. At any point in the pregnancy term, the strength of the state's interest can only be determined by balancing "the relative weight of the respective interests involved." *Roe v. Wade*, 410 U.S. at

[12] The affidavits submitted by plaintiffs give many examples of medical conditions which would not be covered by the new Illinois standards, but which could pose a great threat to the safety of the mother. For example, the affidavit of Dr. David Zbaraz states, at pp. 5-6:

> The lack of certainty about predictions extends to even the most serious of potentially life-threatening conditions. For example, women with sickle cell disease have a 25 per cent probability of going into sickle cell crisis and dying as a result of pregnancy. (The normal pregnancy mortality rate is 20 per 100,000). Because of this extraordinarily high mortality rate, abortions for women with sickle cell disease are almost universally acknowledged to be "medically necessary." I would thus actively counsel such women to have abortions, unless they expressed a very strong desire to have the child. Yet it simply cannot be known, however careful her care and physician's monitoring, whether a particular patient will go into crisis, or whether the state of her disease will remain unaffected by pregnancy. It would not be proper medical care to wait for such an actual threat before terminating the pregnancy, if the patient did not want to incur the risk. Yet the Illinois standard, by requiring certainty about the outcome of a pregnancy, does not comprehend this inherent uncertainty in medical judgment prior to the onset of actual health crises.

165. After the point of viability, for instance, that interest is regarded as "compelling," and justifies the proscription of abortion, except when it is necessary to preserve the life or health of the mother. 410 U.S. at 164.

Similarly, the state's interest in promoting the life of a fetus carried in a woman for whom an abortion is medically necessary is not constant. For the reasons just discussed, a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, we believe a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations. We thus conclude that, as it applies to the abortion of a viable fetus, P.A. 80-1091 (as modified by court order) is constitutional.

We recognize that, as with any standard that relies on the judgment of the individual administering it, "medical necessity" may be subject to deliberate misinterpretation and abuse. Some would argue that unscrupulous physicians, with the active encouragement of their indigent patients, will transform our decision into a *de facto* order that the state fund purely elective abortions. Such a result would, of course, be squarely contrary to the Supreme Court's *Maher* decision. Nonetheless, we believe the inherent elasticity of the standard we adopt today will pose no greater problem to the state's administration of its medical assistance programs than

it did under the funding scheme that preceded P.A. 80-1091. Furthermore, we are encouraged by affidavits submitted by respected members of the medical profession that suggest that the percentage of abortions any physician would deem "medically necessary" may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion. (Affidavit of Dr. Oren Depp, at 7). Finally, we note that providers of services under Illinois medical assistance programs are subject to civil and criminal penalties for filing false Medicaid reimbursement reports. 42 U.S.C. Section 1396h; Ill. Rev. Stat. ch. 23, Sections 12-15, 12-15.1.

CONCLUSION

We hold that the Hyde Amendment and P.A. 80-1091 are unconstitutional as applied to medically necessary abortions prior to the point of fetal viability. All parties are to appear on Monday, April 30, 1979, at 9:30 a.m. to discuss the problems of relief and notice. Plaintiffs are to prepare an appropriate judgment order and order granting injunctive relief for submission to the court on Monday, April 30, 1979.

DATED: April 29, 1978

ENTER: /s/ JOHN F. GRADY
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc, et al.,

Defendants.

No. 77 C 4522.

FINAL JUDGMENT AND ORDER
[April 30, 1979]

On April 27, 1979, this Court issued a Memorandum Opinion which, *inter alia*, held Illinois' intended policy of denying reimbursement for all abortions under its medical assistance programs except those which it is required to fund under the District Court's modified injunction of February 15, 1979, unconstitutional as applied to medically necessary abortions performed prior to fetal viability. The District Court's previous

May 15, 1978 Judgment and its June 13, 1978 Judgment, as modified by this February 15, 1979 Order, remain in force. But this Court directed plaintiffs to prepare an appropriate judgment order and order granting injunctive relief incident to the April 27, 1979 Memorandum Opinion for submission on April 30, 1979. Plaintiffs have done so. This Court has considered plaintiffs' proposed Decree, and now hereby ORDERS, ADJUDGES AND DECREES THAT:

1. This Court has jurisdiction over this case under 28 U.S.C. §§ 1343(3) and (4).

2. As used in this Judgment and Order, the following terms have the meanings indicated—

(a) "Recognized and legal medical providers" means all persons or institutions in Illinois who are certified to obtain reimbursement for medical services under the Illinois medical assistance programs;

(b) "Illinois medical assistance programs" means the Medicaid, state-funded General Assistance and Aid to the Medically Indigent programs, established pursuant to Ill. Rev. Stat., ch. 23, Arts. V-VII;

(c) "Indigent pregnant women" means pregnant women eligible for assistance under the Illinois medical assistance programs;

(d) "Medically necessary" as modifying "abortion" means an abortion which is necessary for the preservation of the life or the physical or mental health of a woman seeking such treatment, in the professional judgment of a licensed physician in Illinois, exercised in light of all factors relevant to her health.

(e) "Illinois' restrictive abortion funding policy" means the policy Illinois adopted pursuant to P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as modified by the District

Court Order of February 15, 1979, and as described in the notices attached hereto as Exhibits A and B;

(f) "Fetal viability" means the point during pregnancy at which, in the professional judgment of a licensed physician in Illinois, a fetus is potentially able to live outside the mother's womb, albeit with artificial aid, such that there is a potentiality for meaningful life, not merely momentary survival.

3. There are two plaintiff classes herein, certified pursuant to F.R.C.P. 23(a) and (b)(2). They consist of:

(a) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and

(b) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs.

4. Partial summary judgment is granted to both plaintiffs and defendants, as follows—

(a) Partial summary judgment is granted to plaintiffs that:

(i) Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied by Illinois to deny funding, under the Illinois medical assistance programs, for medically necessary abortions performed prior to fetal viability, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution;

(ii) The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz v. Quern*, ... F.2d ..... (Feb. 13, 1979) to permit Illinois to deny

funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed prior to fetal viability, violates the Fifth Amendment to the United States Constitution.

(b) Partial summary judgment is granted to defendants that:

(i) Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied by Illinois to deny funding under the Illinois medical assistance programs, for medically necessary abortions performed after fetal viability, do not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(ii) The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz v. Quern*, ... F.2d ..... (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed after fetal viability, does not violate the Fifth Amendment to the United States Constitution.

5. Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied to deny funding, under the Illinois Medical assistance programs, for medically necessary abortions performed prior to fetal viability, are, pursuant to 28 U.S.C. § 2201, declared to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz v. Quern*, ... F.2d. ..... (Feb. 13, 1979) to permit Illinois to deny funding, under its

Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed prior to fetal viability, is, pursuant to 28 U.S.C. § 2201, declared to violate the Fifth Amendment to the United States Constitution.

6. Defendant Arthur F. Quern, his agents, employees and all persons in active concert with him are permanently enjoined from—

(a) enforcing Illinois' restrictive funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, to deny payments under the Illinois medical assistance programs to any recognized and legal providers for the rendition of medical services to indigent pregnant women for medically necessary abortions performed prior to fetal viability, or to deny such payments on behalf of any such indigent pregnant women for such abortions; and

(b) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that any medically necessary abortions performed prior to fetal viability, are not, or will not be, a covered service under the Illinois medical assistance programs.

7. Within 21 days from the entry of this Decree, or within such additional time as this Court may allow, defendant Quern is ORDERED TO—

(a) direct, by first-class mail, to all recognized and legal medical providers notices, certification forms, and revisions to the Handbook for Physicians, which explain, completely, the terms of ¶6(a) herein, and of the means by which such providers can secure reimbursement for medically necessary abortion services. (Defendant is further ORDERED to furnish such notices, forms and revisions to plaintiffs' attorneys at least seven working days prior to their official promulgation.);

(b) direct, by first-class mail, the notice attached hereto as Exhibit C (printed in English and Spanish) to all Illinois medical assistance program recipients who may be affected by this Decree.

8. (a) The question of defendants' liability for attorneys' fees, and the amount of such fees to plaintiffs, is reserved until further order of this Court. Plaintiffs need not submit any claim for attorneys' fees until such time as this Court considers this question.

(b) Costs are awarded to plaintiffs.

ENTER: /s/ JOHN F. GRADY
UNITED STATES DISTRICT JUDGE

DATED:

[Exhibits omitted]

STATUTES AND REGULATIONS INVOLVED

APPENDIX G

Federal Statutes

42 U.S.C. § 1320c(1) (1976).

In order to promote the effective, efficient, and economical delivery of health care services of proper quality for which payment may be made (in whole or in part) under this chapter and in recognition of the interests of patients, the public, practitioners, and providers in improved health care services, it is the purpose of this part to assure, through the application of suitable procedures of professional standards review, that the services for which payment may be made under this chapter will conform to appropriate professional standards for the provision of health care and that payment for such services will be made—

> only when, and to the extent, medically necessary, as determined in the exercise of reasonable limits of professional discretion. . . .

42 U.S.C. § 1320c-1 (1976), *as amended by* **Pub.L. No. 95-142, § 5(a), (o)(1) (1977).**

(a) The Secretary shall (1) not later than January 1, 1974, establish throughout the United States appropriate areas with respect to which Professional Standards Review Organizations may be designated, and (2) at the earliest practicable date after designation of an area enter into an agreement with a qualified organization whereby such an organization shall be conditionally designated as the Professional Standards Review Organization for such area. If, on the basis of its performance

during such period of conditional designation, the Secretary determines that such organization is capable of fulfilling, in a satisfactory manner, the obligations and requirements for a Professional Standards Review Organization under this part, he shall enter into an agreement with such organization designating it as the Professional Standards Review Organization for such area.

(b) For purposes of subsection (a) of this section, the term "qualified organization" means—

> **(1)** when used in connection with any area—
>
> **(A)** an organization (i) which is a nonprofit professional association (or a component organization thereof), (ii) which is composed of licensed doctors of medicine or osteopathy engaged in the practice of medicine or surgery in such area, (iii) the membership of which includes a substantial proportion of all such physicians in such area, (iv) which is organized in a manner which makes available professional competence to review health care services of the types and kinds with respect to which Professional Standards Review Organizations have review responsibilities under this part, . . .
>
> **(B)** such other public, nonprofit private, or other agency or organization, which the Secretary determines, in accordance with criteria prescribed by him in regulations, to be of professional competence and otherwise suitable. . . .
>
> . . .

(e) Where the Secretary finds a Professional Standards Review Organization (whether designated on a conditional basis or otherwise) to be competent to perform review responsibilities, the review, certification, and similar activities otherwise required pursuant to provisions of this chapter (other than this part) shall not be applicable with respect to those providers, suppliers,

and practitioners being reviewed by such Professional Standards Review Organization, except to the extent specified by the Secretary.

42 U.S.C. § 1320c-4(a)(1) (1976), *as amended by* Pub.L. No. 95-142, § 5(d)(3)(B)(i), (o)(2) (1977).

Notwithstanding any other provision of law, but consistent with the provisions of this part, it shall be the duty and function of each Professional Standards Review Organization for any area to assume, at the earliest date practicable, responsibility for the review of the professional activities in such area of physicians and other health care practitioners and institutional and noninstitutional providers of health care services (except as provided in paragraph (7)) in the provision of health care services and items for which payment may be made (in whole or in part) under this chapter for the purpose of determining whether—

(A) such services and items are or were medically necessary;

(B) the quality of such services meets professionally recognized standards of health care;

. . .

42 U.S.C. § 1320c-5 (1976).

(a) Each Professional Standards Review Organization shall apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice in its regions (including typical lengths-of-stay for institutional care by age and diagnosis) as principal points of evaluation and review. . . .

(b) Such norms with respect to treatment for particular illnesses or health conditions shall include (in accordance with regulations of the Secretary)—

(1) The types and extent of the health care services which, taking into account differing, but acceptable, modes of treatment and methods of organizing and delivering care are considered within the range of appropriate diagnosis and treatment of such illness or health condition, consistent with professionally recognized and accepted patterns of care;

(2) the type of health care facility which is considered, consistent with such standards, to be the type in which health care services which are medically appropriate for such illness or condition can most economically be provided.

. . .

42 U.S.C. § 1396 (1976).

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

42 U.S.C. § 1396a(a) (1976).

A State plan for medical assistance must—

. . .

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

. . .

. . .

(13) provide—

(A)(i) for the inclusion of some institutional and some noninstitutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title, and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least—

(i) the care and services listed in clauses (1) through (5) of section 1396d(a) of this title or

(ii)(I) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan include hospital or skilled nursing facility services, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hospital services from such hospital or skilled nursing facility services from such facility, and

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1320a-1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan, except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as

the reasonable cost of such services for purposes of subchapter XVIII of this chapter;

. . .

. . .

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, . . .

. . .

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients;

. . .

(22) include descriptions of . . . (D) other standards and methods that the State will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality;

. . .

(30) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1396b(i)(4) of this title) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care;

. . .

42 U.S.C. § 1396b(a) (1976).

From the sums appropriated therefor, the Secretary (except as otherwise provided in this section) shall pay to each State which has a plan approved under this subchapter, for each quarter, beginning with the quarter commencing January 1, 1966—

(1) an amount equal to the Federal medical assistance percentage (as defined in section 1396d-(b) of this title, subject to subsections (g) and (h) of this section) of the total amount expended during such quarter as medical assistance under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter, for individuals who are eligible for medical assistance under the plan and (A) are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or (B) with respect to whom there is being paid a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of

this title, and except in the case of individuals sixty-five years of age or older and disabled individuals entitled to hospital insurance benefits under subchapter XVIII of this chapter who are not enrolled under part B of subchapter XVIII of this chapter, other insurance premiums for medical or any other type of remedial care or the cost thereof); plus

. . .

(5) an amount equal to 90 per centum of the sums expended during such quarter which are attributable to the offering, arranging, and furnishing (directly or on a contract basis) of family planning services and supplies;

. . .

42 U.S.C. § 1396d(a) (1976), *as amended by* **Pub. L. No. 95-210, § 2(a) (1977).**

For purposes of this subchapter—

The term "medical assistance" means payment of part or all of the cost of the following care and services (if provided in or after the third month before the month in which the recipient makes application for assistance) for [eligible] individuals, . . .

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

(2)(A) outpatient hospital services, and (B) consistent with State law permitting such services, rural health clinic services (as defined in subsection (l) of this section) and any other ambulatory services which are offered by a rural health clinic (as defined in subsection (l) of this section) and which are otherwise included in the plan;

(3) other laboratory and X-ray services;

(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and

periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies;

(5) physicians' services furnished by a physician (as defined in section 1395x(r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;

(6) medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;

(7) home health care services;

(8) private duty nursing services;

(9) clinic services;

(10) dental services;

(11) physical therapy and related services;

(12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select;

(13) other diagnostic, screening, preventive, and rehabilitative services;

(14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;

(15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals who are deter-

mined, in accordance with section 1396a(a)(31)(A) of this title, to be in need of such care;

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; and

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

Labor—HEW Appropriations Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) ("The Hyde Amendment").

None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

APPENDIX H

FEDERAL REGULATIONS

44 Fed. Reg. 17937 (1979) (to be codified in 42 C.F.R. § 435.903).

The agency's policies and procedures must ensure that eligibility is determined in a manner consistent with simplicity of administration and the best interests of the applicant or recipient.

42 C.F.R. § 440.210 (1978).

A State plan must specify that, as a minimum, categorically needy recipients are provided the services as specified in **§§ 440.10-440.50.**

42 C.F.R. § 440.220 (1978).

If the plan includes the medically needy, it must specify that the medically needy are provided, as a minimum—

(a) The medical and remedial services in §§ 440.10-440.50; or

(b) The services contained in any seven of the sections in §§ 440.10—440.160 and, if the plan includes inpatient hospital services or skilled nursing facility services, physicians' services to recipients who are patients in a hospital or skilled nursing facility, even though physician services, as defined in § 440.50, are not otherwise included for the medically needy.

42 C.F.R. § 440.230 (1978).

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures.

42 C.F.R. § 440.260 (1978).

The plan must include a description of methods and standards used to assure that services are of high quality.

APPENDIX I

ILLINOIS STATUTE

Act of Nov. 17, 1977, P.A. 80-1091, § 1, Ill. Rev. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1977).

§ 5-5.

The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing home services; (5) physicians' services whether furnished in the office, the patient's home, a hospital, a skilled nursing home, or elsewhere; (6) medical care, or any other type of remedial care furnished by licensed practitioners; (7) home health care services; (8) private duty nursing service; (9) clinic services; (10) dental services; (11) physical therapy and related services; (12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in the diseases of the eye, or by an optometrist, whichever the person may select; (13) other diagnostic, screening, preventive, and rehabilitative services; (14) transportation and such other expenses as may be necessary; (15) any other medical care, and any other type of remedial care recognized under the laws of this State, but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preser-

vation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child. The preceding terms include nursing care and nursing home service for persons who rely on treatment by spiritual means alone through prayer for healing.

. . .

§ 6-1.

Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions of Sections 6-1.1 through 6-1.6. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

. . .

§ 7-1.

Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Sections 7-1.1 through 7-1.3, except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

No. 79-64

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Petitioners,

v.

JEFFREY C. MILLER, Acting Director, Illinois Department of Public Aid, JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D., and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATE RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Jeffrey C. Miller, Acting Director of the Illinois Department of Public Aid,[1] respectfully requests that

[1] Arthur F. Quern resigned as the Director of the Illinois Department of Public Aid, effective September 1, 1979. Jeffrey C. Miller has been appointed as Acting Director of the Illinois Department of Public Aid. Supreme Court Rule 48(3) provides that under such circumstances Jeffrey C. Miller should be automatically substituted as a party.

this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 596 F.2d 196.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

REVIEW OF THE COURT OF APPEALS' DECISION WILL NOT AID THIS COURT IN AVOIDING CONSTITUTIONAL ADJUDICATION.

Petitioners, plaintiffs below, have conditionally argued that this Court's consideration of the statutory questions presented in their petition for certiorari would allow this Court to avoid deciding the important constitutional questions presented by respondents in their respective appeals to this Court. The judicial preference for the avoidance of constitutional adjudication, plaintiffs claim, provides ample reason for this Court's granting the writ of certiorari.

This novel argument fails to present any convincing reasons why certiorari should be granted. First, this Court has set forth the various considerations which would enter into its determination to grant certiorari in a given case in Supreme Court Rule 19(1)(b). There is absolutely no indication in that rule that the avoidance of constitutional adjudication is a factor which would in any way motivate this Court to exercise its jurisdiction.

Second, the plaintiffs' argument fails to take into account the very strong possibility that this Court may very well affirm the Seventh Circuit's finding that the Hyde Amendment substantively amended Title XIX of the Social Security Act. If that were to occur, then this Court would still be faced with the constitutional issues raised in the appeals from the district court's order. Plaintiffs' have, of course, argued that those constitutional issues are not properly before this Court, but as respondents will demonstrate in Section III of this brief, the

equal protection issues are, and have been, an integral part of this case since its inception. Therefore, the rule against unnecessary constitutional adjudication, even if relevant to the exercise of jurisdiction, would be furthered only if this Court accepts petitioners' arguments as to the merits of their case.

Most importantly, it is the state defendant's contention that plaintiffs' claims can be raised in the context of defendants' appeals to this Court from the district court's opinion. Those appeals were taken under 28 U.S.C. § 1252, which provides for a direct appeal to this Court when a statute of the United States has been declared unconstitutional.[2] An appeal under § 1252 brings the *entire* case before this Court, thus allowing the Court to consider all other issues arising from the case, including non-constitutional ones. *United States* v. *Raines,* 362 U.S. 17, 27, n. 7 (1960); *McLucas* v. *DeChamplain,* 421 U.S. 21, 32-33 (1975). The conditional petition for certiorari is, therefore, needless.

Plaintiffs argue that certain decisions of this Court preclude review of the court of appeals' decision in the § 1252 case, relying on *Farmers and Mechanics Nat'l Bank* v. *Wilkinson,* 266 U.S. 503 (1925) and *Union Trust Co.* v. *Westhus,* 228 U.S. 519 (1913). At the time those cases were decided, the applicable jurisdictional statute, provided for direct appeals to the Supreme Court from interlocutory or final judgments of district courts in five instances. For example, any case involving the construction or application of the Constitution of the United States, in which the constitutionality of any law of the United States was drawn into question or in which the Constitution or law of a state was claimed to be in contravention of the Constitution of the United States could be appealed directly from the district court to the Supreme Court.

---

[2] 28 U.S.C. § 1252 also provides that a party who has received a notice of appeal under § 1252 "shall take any subsequent appeal or cross appeal to the Supreme Court,. . . ." This section obviously intended to give this Court *appeal* jurisdiction over the entire case.

In 1925 Congress amended the judicial code and abolished the very expansive categories of obligatory jurisdiction cited above. The direct appeal jurisdiction of the Supreme Court under § 1252 was narrowed to the single instance wherein an Act of Congress was declared unconstitutional and where the United States has decided to intervene as a party.[3] Act Feb. 13, 1925, ch. 229, 43 Stat. 938. Thus the statute was substantially altered.[4] The drain on this Court's time and resources caused by the almost unlimited number of cases which fell within the confines of the former statute was certainly a major factor in the Court's restrictive interpretation of that statute in the *Wilkinson* and *Westhus* cases cited by the petitioners.

While this Court has continued to strictly interpret the mandatory jurisdictional statutes, such as 28 U.S.C. § 1253, *see, e.g., Gonzales* v. *Automatic Employees Credit Union,* 419 U.S. 90 (1974), cases brought under 28 U.S.C. § 1252 have not been subject to the same approach. *McLucas* v. *DeChamplain, supra,* 421 U.S. at 32. In that case this Court specifically held that "in § 1252 Congress unambigously mandated an exception to this policy in the narrow circumstances that the section identifies. . . ." *Id.* Justice Powell, speaking for the Court, clearly enunciated the rationale behind the exception:

> . . . to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality.

As the jurisdictional statute has changed so substantially since the time of the decisions cited by petitioners, those decisions cannot be said to represent the current state of the law

[3] Direct appeal jurisdiction from a three judge district court is also granted under 28 U.S.C. § 1253. Cases in which a state statute is held invalid as repugnant to the United States Constitution, laws or treaties are governed by 28 U.S.C. § 1254(2).

[4] Another change in the statute is that this Court has held that § 1252 jurisdiction encompasses cases from the circuit courts of appeal. *Parker* v. *Levy,* 414 U.S. 973 (1973).

on the direct appeal jurisdiction of this Court and should be considered as obsolete.[5] When a federal statute has been declared unconstitutional by a district court, Congress has obviously evidenced its intent that such decision be given prompt consideration by this Court. The related appeal is just such a case, and involves important issues of national interest. As previously stated, when an appeal is brought under § 1252, it brings the whole case before this Court. Since petitioners' arguments could be included in the appeals in this case which are presently before this Court,[6] their petition for certiorari is unnecessary and should be denied.

II.

THE DECISION OF THE COURT OF APPEALS IS PLAINLY CORRECT.

The state defendant believes that a detailed argument on the merits of the federal statutory issue is unnecessary, and that the opinion of the Court of Appeals as to the questions presented by plaintiffs is well reasoned and correct. Since plaintiffs have urged, however, that the granting of their petition for certiorari would permit disposition of the entire case without reaching the constitutional issues raised in the appeals, defendant will briefly discuss the Seventh Circuit's ruling in order to demonstrate that this Court will have to reach the constitutional issues even if the petition is granted.

[5] Should this Court grant petitioners' Petition for Certiorari and find no jurisdiction over the appeals (a circumstance apparently under which petitioners are not seeking certiorari), this Court might then be faced with the same issues on appeal a second time. If respondents pursued an appeal to the court of appeals and it affirmed the district court's decision, then § 1252 jurisdiction again would be provided. That would create the effect of a bifurcated appeal and certainly be detrimental to the interests of judicial economy.

[6] Those appeals are presently docketed before this Court as Nos. 79-4, 79-5 and 79-491.

Plaintiffs have argued that the effect of the Hyde Amendment[7] is simply a withholding of federal funds, and that Congress did not intend to make substantive changes in Title XIX of the Social Security Act. They claim that the court below erroneously interpreted the legislative history of the act in reaching its conclusion. The court below, however, undertook a careful analysis of the congressional debates was convinced by several relevant factors that a substantive amendment of Title XIX was intended by Congress.[8] First, the court was impressed by the absence of any suggestion, by either proponents or opponents of the legislation, that state funding of abortions would be required to continue despite the lack of federal funds. As the court stated, ". . . the assumption was that when federal funds were withdrawn, the states . . . would refuse to do so."[9] *Zbaraz, supra,* 596 F.2d at 200. The court also relied upon the fact that throughout the debates a common conviction was frequently expressed that taxpayers should not finance abortions to which they were opposed for moral or religious reasons. If the states were still required to fund abortions, then those strongly held beliefs would not be furthered whatsoever.

[7] For the last three years Congress has passed a rider to the annual HEW appropriations. The amendments have become commonly known as the "Hyde Amendment" although Congressman Hyde has not always been the sponsor of the rider. For purposes of this brief, the riders will be referred to as the "Hyde Amendment." although technically speaking the FY 1977 rider is Pub. L. No. 94-439, § 209 (1976); FY 1978 rider is Pub. L. No. 95-205, § 101 (1977) and FY 1979 rider is Pub. L. 95-480, § 210 (1978).

[8] Petitioners also argue that resort to the legislative history was inappropriate. The Seventh Circuit correctly found that it was necessary to consult the legislative history of the Hyde Amendment "because not all of the obligations of the states are clearly spelled out in that statute, and because those obligations arise in the context of a plan for sharing expenses between the federal and state governments." *Zbaraz* v. *Quern,* 596 F.2d 196, 200 (7th Cir. 1979).

[9] The court noted that a few Congressmen and Senators stated that the amendment would merely restrict federal funding, but found that in the context presented the "remarks were meant only to distinguish between a total ban on abortions and a refusal to pay for abortions." *Id.*

Plaintiffs argument also fails to recognize that their position requires the finding that Congress repealed by implication the basic funding design of Title XIX—that the federal government and participating states *share* in the funding of medical assistance on a roughly 50/50 basis. 42 U.S.C. § 1396(b)(a)(7). There is nothing in either the language of the Hyde Amendment or the legislative history which would indicate that Congress intended to radically alter the basic funding mechanism of Title XIX.[10] If Congress had intended to make such grave changes in the scheme of cooperative federalism, it certainly would have done so expressly. Finally, Congress has enacted substantially the same provision for three successive fiscal years with respect to Title XIX abortion funding.[11]

[10] The court below recognized that Medicaid and other related statutes do require complete funding of minor portions of the program by the state alone, but "when Congress has imposed such conditions, it has done so explicitly and for the apparent purpose of encouraging the states to undertake programs Congress deems desirable . . . it . . . clearly did not intend to encourage abortions." *Id.,* n. 12.

[11] With respect to the fiscal 1980 HEW appropriations measure presently before Congress an interim funding measure for the period of October 1, 1979 through November 20, 1979 has been passed which provides:

> SEC. 118 Notwithstanding any other provision of this joint resolution except section 102, none of the Federal funds provided by this joint resolution for the District of Columbia, Foreign Assistance and Related Programs, the Departments of Labor and Health, Education, and Welfare, or the Department of Defense shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Congressional Record, H.R.J. Res. 412, 96th Cong., 2nd Sess., 92 Cong. Rec. H 9081 (1979).

The above are all clear and convincing indicia that Congress did intend to change the Social Security Act's coverage with respect to abortions with the Hyde Amendment. Moreover, despite petitioners' claims to the contrary, it is well established that Congress does have the power to make substantive changes in the law by way of an appropriations bill. *United States* v. *Dickerson,* 310 U.S. 554 (1940).[12] This Court has, of course, recently expressed disapproval of repeals by implication and set forth several considerations to be weighed in determining whether a repeal has been effected. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978). The most important of the considerations is perhaps that the amendment manifest the clear intention of the legislature to repeal prior law, 437 U.S. at 129,[13] and as the court below noted, in this regard "the circumstances under which the Hyde Amendment was passed distinguish it from the *Hill* case."
Zbaraz, supra, 596 F.2d at 201.

The language of the statute expressly prohibiting expenditure of funds for abortions evidences a *specific* intent with respect to a *specific medical procedure.* It is distinguishable from congressional approval of the general T.V.A. budget which as a matter of course included funds for the Tellico dam. The Hyde Amendment is attached to the appropriations act for the very statute it was intended to amend. In comparison, the

[12] In several cases subsequent to *Dickerson,* courts have construed congressional appropriations measures *prohibiting* the use of federal funds in a particular manner to have worked substantive modifications of prior law. *See, Eisenberg* v. *Corning,* 179 F.2d 275, 276 (D.C. Cir. 1949); *Friends of the Earth* v. *Armstrong,* 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied* 414 U.S. 1171; *City of Los Angeles* v. *Adams,* 556 F.2d 40, 48-49 (D.C. Cir. 1977).

[13] The other factors to be weighed are the express terms of the appropriations measure; the legislative history of the bill; the awareness of Congress as a whole as to the possible conflict between the funding provision and prior law; the existence of a clear repugnancy between the old and the new law.

act in the *Hill* case which was allegedly repealed was the Endangered Species Act—an entirely unrelated and independent act from the T.V.A. act. Moreover, the Hyde Amendment continues to be in the form of limiting previously authorized expenditures rather than permitting formerly prohibited expenditures as in *Hill.* In addition, there was no indication in the *Hill* case that Congress was aware as a whole that the appropriations bill was working a repeal of the Endangered Species Act. In the instant case, it is more than evident that Congress has been aware of the substantive nature of abortion funding limitations since it has forcefully debated the issue each year since 1977.

The ruling of the court below does not conflict with the decisions of the only other circuit court of appeals which has considered the issue. *Preterm Inc.* v. *Dukakis,* 591 F.2d 121 (1st Cir. 1979). In fact both courts examined the legislative history and the Act itself following the directives set forth in the *Hill* case. Both courts reached the conclusion that Congress intended to substantively amend the Medicaid Act when it passed the Hyde Amendment. If a state were required to fund all "medically necessary" abortions as petitioners claim, then not only would the very purpose of the Hyde Amendment be totally eviscerated, but so would the cooperative federal-state structure of the Medicaid Act.

III.

THE CONSTITUTIONALITY OF THE HYDE AMENDMENT IS SQUARELY AT ISSUE IN THIS CASE.

Plaintiffs claim that they have never challenged the constitutionality of the Hyde Amendment and that the Seventh Circuit erroneously directed the district court to consider that issue. Obviously petitioners are somewhat reticent about bringing that issue before this Court, although they have appeared confident throughout the litigation that Illinois's rated

the statute which is substantially similar runs afoul of the Constitution. When the court below reached the conclusion that Title XIX was substantively amended, then the question regarding the constitutionality of the state statute became irrevocably intertwined with the constitutionality of the Hyde Amendment. Moreover, once the Seventh Circuit found that the more restrictive portions of the Illinois statute were not in compliance with Title XIX, then both the Illinois statute as construed and the Hyde Amendment became identical. Thus, any resolution of the constitutional issues will pertain equally to either statute.

It must also be kept in mind that the program under consideration is the joint federal-state Medicaid plan. If the court had failed to order consideration of the federal statute and the lower court had found any part of the state statute unconstitutional, then the state would be required to fund medical procedures for which the federal government would not provide reimbursement. This would create the anomalous situation whereby the state could not get federal reimbursement for a procedure required by a federal court, yet the very statute relied upon by the federal government for lack of funds would be identical to the state statute which the federal court held unconstitutional. Failure to consider both statutes, therefore, would have the potential effect of irreparably altering the basic nature of the compact between Illinois and the federal government under Title XIX of the Social Security Act.

Finally, Respondents have all formally taken the position in the district court that they were entitled to summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56 based upon the constitutionality of the Hyde Amendment under the Fifth Amendment. The issue of the Hyde Amendment was therefore squarely brought into the case in two ways. First, of necessity by the court below because of the inextricably intertwined nature of the state and federal law, and secondly, by virtue of respondents' motions for summary judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-64

DAVID ZBARAZ, M.D., et al.
Petitioners

vs.

ARTHUR F. QUERN, et al.
Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Seventh Circuit

MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

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MOTION FOR APPOINTMENT OF ALAN ERNEST AS
COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins ch.13, s. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost allwere born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-64

DAVID ZBARAZ, M.D., et al.
Petitioners

vs.

ARTHUR F. QUERN, et al.
Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE RESPONDENTS

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE RESPONDENT

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

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AUTHORITIES

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AMICUS CURIAE BRIEF

For the 37th time, the Supreme Court is petitioned to overrule its 1973 abortion decision, Roe v Wade, 410 US 113. The grounds are set out below in the SUMMARY OF ARGUMENT.

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-7.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 8-11.

3. It is further alleged that many of the killings that the U.S. Supreme Court asserted to legalize in Roe v Wade are murder in the first degree. The evidence presented in the MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE, filed in this case, is incorporated herein by reference.

4. It is further alleged that the Roe v Wade killings violate federal and state positive criminal statutes. The U.S. Supreme Court is herein charged with crim-

inal falsehood and criminal extermination, including mass murder in the first degree. See PART III, infra pages 11-14.

5. It is alleged that the judges of the United States have combined to overthrow the Constitution of the United States and to establish a government by Judiciary, founded on fraud and murder. See PART IV, infra pages 15-22.

ARGUMENT

PART I
ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113, is based on false evidence and millions of lives have been unconstitutionally exterminated. The documentation to prove this charge has been repeatedly submitted to the Supreme Court.

This documentation was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v. John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

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Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the

same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American physician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment, "any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and

more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings are in such manifest conflict with due process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No. 78-427, cert. denied 58 L Ed 2d 324):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg

court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [The Justice Case infra p. 19, at 1046.]

" The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented. [1]

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1. In Planned Parenthood of Central

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to

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Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 728 (5th ed 1978). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.

And the Supreme Court either refused permission to file amicus curiae briefs, or refused to fully and fairly hear amicus curiae briefs, which presented this new evidence, in Colautti v Franklin, 58 L Ed 2d 596; Bellotti v Baird, L Ed 2d ; Anders v. Floyd, 59 L Ed 2d 442; and Ashcroft v Freiman, affd 59 L Ed 2d 630.

life. [2]

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2. The Supreme Court has repeatedly refused to allow counsel to represent children unborn or born alive in its judicial proceedings, and to defend their constitutionally protected right to life.

In Doe v Bolton, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing at 5. But the Court denied the request.

In Colautti v Franklin, 58 L Ed 596, the Court again extended the killings in the name of Roe v Wade, after refusing to allow counsel to represent the victims and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. Motion denied at 57 L Ed 2d 1131.

In Anders v Floyd, 59 L Ed 2d 442, the Court again refused to allow counsel to represent the victims, and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 59 L Ed 2d 442.

In Bellotti v Baird, L Ed 2d , the Court refused to allow counsel to represent the victims and present new evidence (See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE in this case) to show that the victims were being murdered. 59 L Ed 2d 451.

In Ashcroft v Freiman, 59 L Ed 2d 630, the Court affirmed an appeal after refusing to allow counsel to represent the victims and defend their constitutional right not to be murdered.

And the Supreme Court refused to allow counsel to represent the victims and defend their constitutional right not to be murdered in Baird v Sharp, cert. denied 60 L Ed 2d 1057, and Preterm v King, cert. denied 60 L Ed 2d 1057.

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

Thus, the Court has repeatedly heard and decided abortion cases, and struck down state abortion laws, and effectively extended the killing in the name of Roe v Wade, and refused to appoint counsel to represent the victims and present new evidence, never presented by the parties, to show that the victims are being exterminated in violation of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree.

It can not be pretended that it is any longer the government of the United States- any government of Constitution and laws- wherein judges presume to decree killing to be a constitutional right and refuse to even listen to the facts.

PART III
THE CASE AGAINST THE SUPREME COURT

Counsel's 8th(Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77-1358), and each subsequent petition, specified the criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And counsel's 25th petition, and each subsequent petition, to overrule Roe v Wade presented the new evidence, adopted herein by reference, which shows many Roe v Wade killings to be murder in the first degree. The Justices who asserted to legalize those killings may now face the death penalty in very many states.

The Supreme Court has never attempted to show the new evidence to be wrong, much less to prove the charges to be false.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that-human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353 (1972). "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact..... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810, 822 (1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" And again, "I may assume that your silence gives consent." Apology in Plato 41, 45(Jowett transl. Classics Club 1942). See also, 4 Wigmore, Evidence, §§ 1071-1072 (Chadbourn rev. 1972).

PART IV

THE SUPREME COURT HAS OVERTHROWN THE UNITED STATES CONSTITUTION

The evidence shows that the judges of the United States have combined to overthrow the United States Constitution, and to establish a government by Judiciary, founded on fraud and murder.

A.

It can not be contested that America was founded upon the principle that government derives its "just powers from the consent of the governed." This was adopted by the Continental Congress in the Declaration of Independence. While the Declaration may not be law in itself, it provides definitions by which the law is to be understood. Gulf, Colo. and S.Fe Ry v Ellis, 165 US 150, 159-160(1896).

The first sentence of the U.S. Constitution sets out this mother principle of democracies: "All legislative powers herein granted shall be vested in a Congress of the United States." Congress is elected by the people at regular elections, and thus, its laws are derived from the consent of the governed.

The Constitution itself was adopted by the people in convention. The Constitution is thus derived from the consent of the gov-

erned. And Article V of the Constitution provides the means for amending the Constitution, which likewise makes amendments be derived from the consent of the governed.

B.

Under the U.S. Constitution's Article III, the federal judiciary is not elected by the people, and holds office during good behavior, in effect, for life.

The Constitution gives the judges no power to make laws. The lawmaking power, as admitted by the Supreme Court, is the power to make new rules for the future. Ross v Oregon, 227 US 150, 161 (1913).

While the judicial power does not admit to lawmaking, it has been decided that it does admit to determining the meaning of statutes, and the U.S. Constitution. Marbury v Madison, 1 Cranch 137(1803). But the Supreme Court has no power to make new laws under the guise of construction. Pillsbury v United Engineering, 342 US 197, 199.

The rules used by the courts to construe the meaning of the laws are founded in the principle that laws are derived from the consent of the governed. The purpose of construction is to determine the intent of the lawmaker.

Chief Justice John Marshall recognized this "consent of the governed" as the foundation of the rules that the courts must apply in construing the Constitution.

FIRST: The Constitution must be given the meaning "contemplated by its framers."

Ogden v Sanders, 12 Wheat. 212, 332(1827) (dissenting opinion).

SECOND: "(I)n no doubtful case would it pronounce a legislative act to be contrary to constitution." Dartmouth College v Woodward, 4 Wheat. 518, 625(1819).

The foundation under these two rules is too compelling to admit any doubt as to the truth of the two rules.

Since the legitimacy of the Constitution is derived from the consent of the governed, any true construction must give the Constitution the meaning intended by the people who framed and adopted it. The central question is: To what have the people consented. Any policy of construction that disregards the consent of the governed can not be lawful. And to what the people have consented is susceptible to proof by evidence which can be independently verified. Thus the security of a written Constitution.

The second rule is a necessary corollary of the first. The right of the people to govern themselves being so paramount, it takes careful and clear evidence to warrant a conclusion that, in the U.S. Constituiton, the people intended to withdraw from themselves the power to make their own laws on that subject. If, after review of the words of the Constitution, and the historical evidence concerning the meaning of those words, a reasonable doubt remains as to whether the makers of the Constitution intended to prohibit such a law, then

the law must stand as valid. The opinions of unelected officials holding office for life are not to be substituted for the judgments of the peoples' elected representatives unless the conflict between the law and the Constitution is clear.

The decisions of Chief Justice John Marshall are submitted as a faithful execution of these two principles of construction.

C.

In his Farewell Address, Washington warned that the customary means of overthrowing constitutions was by usurpation:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. 35 The Writings of George Washington 229(Fitzpatrick ed. 1949).

D.

The world does not want for examples of democratic constitutions overthrown by the process of usurpation.

Prior to World War II, the German Constitution was thought to be a model of democracy and freedom, "the most liberal and democratic document of its kind the twentieth century had seen," which declared "Political power emanates from the people." W.L. Shirer, The Rise and Fall of the Third Reich

88-89(Fawcett Crest paperback 1969). Hitler came to power "within the terms of the constitution." Id., at 255.

Thereafter, by usurpation, Hitler became the "supreme judge" of Germany. The Justice Case, 3 Trials of War Criminals before the Nuernberg Military Tribunals 1011 (1951). The decrees of this "supreme judge" were obeyed as law. The "supreme judge" presumed to decree murder to be lawful. And this "supreme judge" was unquestioningly obeyed by the Nazi judges.

At Nuremberg, the Nazi judges claimed the defense that they could not be held accountable for their crimes against humanity, including "extermination," because they were bound by the "decrees" of the "supreme judge" of Germany. The Justice Case, supra, 983-85,1010-1014. The Nuremberg court rejected that defense with the observation,"The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, supra, at 985.

Never formally repealed, the Constitution was overthrown by usurpation.

E.

The evidence shows that the judiciary of the United States has set upon a course of usurpation astonishingly similar to that traveled by the Nazi judicial system.

The judges of the United States came to power within the terms of the Constitution. The evidence shows that the judges routinely, as a matter of policy, defy the consent

of the governed, and effectively assert their will to be law. See, R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment(1977). This book sets out evidence to show that the Supreme Court has generally construed the Fourteenth Amendment in defiance of the intent of its framers. Berger concludes, "Such conduct impels one to conclude that the Justices are become a law unto themselves." Id., at 408.

The evidence shows that the Supreme Court uses false evidence to defy the intent of the framers. Supra, PART I.

The evidence shows that the Supreme Court has presumed to decree murder to be a constitutional right.. See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE incorporated herein by reference.

The evidence shows that when it comes to constitutional questions, truth has nothing to do with the federal courts: the will of the judge has become the law.

The evidence, supra pages 7-11, shows that the Supreme Court , in broad form, has used the same procedures to effect and maintain the Roe v Wade killings as the Nazi judges used to condemn their victims:

> In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. The Justice Case, supra, 1046.

The evidence shows that, through Roe v

Wade, the Supreme Court has effectively asserted a second method for the government to condemn persons to death.

The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right of representation of counsel; and right to confront the accusing evidence and cross-examine it; and right to present evidence on behalf of the accused; and right to be acquitted unless found guilty beyond a reasonable doubt; and provision to stop execution if new evidence is discovered.

The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims) to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution.

The evidence, supra, shows that the Supreme Court decreed murder to be a constitutional right, and there does not appear to be any defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany so the Supreme Court is to America.

The evidence shows that the Supreme Court is being unquestioningly obeyed by the federal judiciary. See counsel's 34th & 35th petitions to overrule Roe v Wade, Unborn Child Roe v. United States Court of Appeals for the District of Columbia Circuit, No. 79-166; and Unborn Child Roe v.

John J, Sirica, Judge, United States District Court for the District of Columbia, No. 79-188. Those courts have effectively ruled that they were bound by Roe v Wade regardless of any claim that it was wrongly decided. The federal judiciary is willing to enforce, permit, and omit to stop killings that violate the express terms of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree, without asking even a single question, much less demanding any answers.

The evidence shows that in the courts of the United States, the will of the judge has replaced the consent of the governed as the basis of law. By any definition, this is the overthrow of the United States Constitution.

If it be true, as Chief Justice John Marshall once held in Marbury v Madison, 1 Cranch 137, 163, 176, 178, that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of political institutions.

Furthermore, the Declaration of Independence is perverted by the judges to effectively read that "all Men are created equal-equal,- except those created to die for the convenience of others."

CONCLUSION

If it be true, as Jefferson once wrote, that America is an "experiment" to establish that "man may be governed by reason and truth," and that "truth and reason will eternally prevail, however in times and places they may be overbourne for a while by violence," then the facts showing the consent of the governed will ultimately prevail.

And Chief Jusitce John Marshall held, for federal judges to "swear" to discharge their duties "agreeably to the constitution tion," and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavors to preserve," is worse than "solemn mockery," it is a "crime." Marbury v Madison, supra, 179-180. The criminal law will not permit the "dagger of the assassin" to be "concealed beneath the robe of the jurist."

If the United States were being ruled over by a Tribunal of murderers holding office for life, and being blindly obeyed by all federal judges who violate the express words of the Constitution and positive criminal statutes, including mass murder in the first degree, without question, then surely it would be a fraud without parallel in the legal history of the world, and tantamount to the overthrow of the Constitution of the United States.

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